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PREFACE

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MILITARY LAW REVIEW

THE FEDERAL TORT CLAIMS ACT: SOVEREIGN LIABILITY TODAY*

BY MAJOR JAMES W. HUNT**

I. THE PLACE OF THE FEDERAL TORT CLAIMS ACT IN THE LAW OF THE UNITED STATES

A. *Variety* of *Interpretation*

The projected impact of the Federal Tort Claims Act[1] is not measurable in terms of its historical application. To determine the impact of a federal law, one need look no farther than today's newspaper headlines to be aware that its effect is determined, not so much by the specific language of its provisions, or even by the intent of Congress in enacting it, as by the interpretations of the federal courts in implementing it. This is true at least until such time as Congress may see fit to override the interpretations of the courts by amendatory legislation or by the enactment of a new law.

Thus it seems at first glance a simple matter to make a determination of the courts' previous implementation of the FTCA and using this as a basis, proceed to a reasonable prediction of its future effect. But here is where history itself is the best witness of its own weakness as a window to the future. For the interpretation of the major provisions of the FTCA have been varied and inconstant, and recent decisions have given indication of a tendency towards wider, more liberal application, which, if continued with any degree of consistency, could result in applications of the act in a manner exactly opposite to that contemplated by the courts which first applied it.

B. *General Provisions of the Act*

The FTCA, enacted on 2 August **1946,** provided for Government liability "for money damages occurring on and after Jan.

* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventh Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

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[1] The broad provisions of the act are set out in 28 U.S.C. §§ 2671–2680 (1952). Exclusive jurisdiction of civil actions on claims against the United States under the act is conferred on the district courts in 28 U.S.C.A. § 1346b (1952).

1, 1945, for injury or loss of propertly, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2]

C. *Historical Development*

It is not surprising that the federal courts initially applied the provisions of the act with considerable caution. The concept of a sweeping waiver of governmental immunity as a result of a general legislative act was something new in the United States, although the earliest awakenings to the just basis for the creation of such liability may be found far back in this country's history.[3]

As time elapsed and litigation under the act arose and increased and became commonplace, the federal courts in many instances appeared to depart from their almost timid original approach and to wield their damage-assessing powers against the United States with greater temerity and resultant expansion of liability findings and substantial judgments. Some recent cases indicate that this tendency is still far from its peak.[4]

This is not to say that there has been a deliberate, step-by-step well-mapped campaign to extend potential recovery under the FTCA and to increase Government liability thereby. Far from it, In point of fact there have been, and are still, courts and court members who have held fast to the principle of strict, cautious construction of the act, and recent cases exist where

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[2] 28 U.S.C. § 1346B (1952).

[3] An analytical examination of the historical development of this concept may be found in an article on "The Federal Tort Claims Act" by Mr. F. G. Hudson in 22 Tul. L. Rev. 29 (1947), which cites among other references statements by John Quincy Adams in 1832, and by Abraham Lincoln in 1861, recognizing the duty of the Government to provide for judicial determination of the claims of its citizens.

[4] E.g., Indian Towing Co. v. United States, 350 U.S. 61 (1955); Rayonier, Inc. v. United States, 352 U.S. 315 (1957). In Builders Corp. of America v. United States, 259 F.2d 766 (9th Cir. 1958), the court said pertinently, "In the area of governmental responsibility for the acts of its agents, the law is in a state of flux. . . . Recently, interpretation has vastly enlarged the sphere of responsibility of government."

this principle has been enunciated.[5] It is merely postulated that certain extensions in recovery and certain increases in Government liability have indeed taken place coincident with the development of legal thought on the application of the act, and perhaps with the appointment to the federal courts of more liberal-minded judges. It may be worthy of note in the latter connection that six of the nine Justices who sat on the bench of the Supreme Court of the United States at the time of the enactment of the FTCA and the determination of early cases thereunder have since exchanged their black judicial robes for either the mufti of retirement or the white robes of eternity.

D. *Government Tort Liability in Other Countries*

Part II will trace the development in judicial interpretaion of the FTCA. A consideration of the manner in which courts of other countries have treated the theory of sovereign liability will provide an enlightening background for an analysis of the evolution of this doctrine in the United States.

1. *The Doctrine in England*

In England, the counterpart of the FTCA is the Crown Proceedings Act of **1947,** which took effect on January **1, 1948.** In the words of an English Professor of Laws, this act is intended in appropriate cases "to put the Crown in its public capacity in the same position for the purpose of the law of tors as a private person of full age and capacity."[6] The English Act, though following the FTCA in point of time, provides by its terms a broader area of sovereign liability. Although the volume of litigation under the Crown Proceedings Act has apparently been less than that produced by the FTCA,[7] analysts in this

[5] In a dissenting opinion in Indian Towing Co. **v.** United States, *supra,* note **4,** at **75,** Mr. Justice Reed (joined in his dissent by Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Minton) felt that "In dealing with this enlarged concept of federal liability for torts, wisdom should dictate a cautious approach. . . ." See also Burna v. United States, **240** F.2d **720, 723** (4th Cir. 1957), where the court in construing the Federal Tort Claims Act, applied the negative principle "that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued."

[6] Wade, Liability in Tort of the Central Government of the United Kingdom, **29** N.Y.U.L. Rev. **1416, 1421 (1954).**

[7] *Id.* at **1427.**

field have agreed that the former provides extensive coverage,[8] and in fact surpasses the latter in this regard.[9]

2. *The Doctrine in Germany*

The present laws of Government liability for the torts of its agents in Germany can trace their origin in some part to principles established by German courts during the sixteenth century.[10] Yet it was the early twentieth century before statutes providing for such liability became general in the German states." Today the trend is to ever-widening Government liability, based on the underlying concept that where the citizen "suffers special damages in the interest of the community he should be compensated and the loss be borne by the community."[12]

3. *The Doctrine in France*

It is in France that this doctrine has reached its widest application. The principle of State liability to citizens injured by State administrative actions came to the fore in the nineteenth century, during which, as one writer puts it, the maxim "The King can do no wrong" was superseded by the saying "The State is an honest man,"[13] meaning that the State desires to repair damages done by its wrongful acts. The term "its wrongful acts" is significant, for Government tort liability in France is not predicated on the agency theory, arising from the torts of Government employees, as it is under the FTCA. Rather, it stems from the fact that, in causing injury, the public service itself has been defective, apart from a fault of any specific Government employee.[14]

This basic difference from United States law has permitted French courts to built up an expanding theory of government liability without fault.[15] Under the French system, "the state

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[8] Id. at 1422, 1424.

[9] Stason, Governmental Tort Liability Symposium, 29 N.Y.U.L. Rev. 1321, 1322 (1954); Braband, Liability in Tort of the Government and its Employees: a Comparative Analysis with Emphasis on German Law, 33 N.Y.U.L. Rev. 18 at 48 (1958).

[10] Braband, *supra,* note 9, at 34.

[11] Id. at 43.

[12] Id. at 48.

[13] Schwartz, Public Tort Liability in France, 29 N.Y.U.L. Rev. 1432, 1438 (1954).

[14] Jacoby, Federal Tort Claims Act and French Law of Governmental Liability: a Comparative Study, 7 Vand. L. Rev. 246, 260 (1954).

[15] Id. at 267.

takes all responsibility for injuries caused by government operations that created, irrespective of negligence, an exceptional risk for the public."[16] Thus in France today anyone injured as a result of an official function by an administrative officer is entitled to compensation on a sort of social insurance theory." It is extremely important to note that although the French law of torts is codified, Government liability under such law is not codified, but is almost completely judge-made.[18]

4. *Comparative Law*

Writers in the field of comparative law seem to agree in stressing the fact that the United States has moved very slowly in assuming liability for wrongs committed by its employees, and in urging expansion of such liability. One writer, for example, says, "For a foreigner it is somewhat astonishing to see how little responsibility the state has assumed for torts committed in its service in the United States. . . . It is, however, obvious that a beginning has been made which in all probability will be the basis for further regulations."[19] Another writer, expressing the view that sovereign immunity is inconsistent with modern conceptions of right and justice, urges firm action by American courts, concluding, "When a doctrine of exclusively judicial origin works manifest injustice the obligation to change it rests primarily on the judge himself."[20]

II. DEVELOPMENT IN JUDICIAL INTERPRETATION OF THE ACT

A. *Case Comparisons*

The international backdrop provided in the previous chapter should serve to emphasize vividly the significance of the changing interpretation of the FTCA by United States courts. A brief comparison of the language of some of the recent cases decided under the act with that of others of earlier vintage will serve to illustrate the apparent judicial metamorphosis.

In *Feres* v. *United States*,[21] decided 4 February 1950, the Supreme Court of the United States (Mr. Justice Jackson deliver-

[16] Braband, *supra*, note 9, at 22.
[17] Schwartz, *supra*, note 13, at 1449.
[18] Jacoby, *supra*, note 14, at 250.
[19] Braband, *supra*, note 9, at 48.
[20] Schwartz, *supra*, note 13, at 1461.
[21] 340 U.S. 135, 142 (1950).

ing the opinion without dissent) said that the effect of the act was "to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." In *Dalehite* v. *United States*,[22] decided *8* June 1953, a majority of the Supreme Court cited this statement in the *Feres* case with approval, and said, "The Act did not create new causes of action where none existed before." But this was a **4–3** opinion with two Justices[23] taking no part in the consideration or decision of the case. Although the *Dalehite* decision did not rest on strict judicial construction alone, but involved many factors, the trend toward liberalization was heralded in the dissenting opinion, written, significantly enough, by Mr. Justice Jaskson,[24] which spoke of the adaptation of the law of negligence by forward-looking courts to modern conditions, and which chided the majority by concluding that if too limited an application were given to the act "the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted ; it has merely been amended to read, 'The King can do only little wrongs.'"[25]:

It should be noted here that there had been earlier cases in which the language of the Court if taken at face value would indicate a tendency to construe the act liberally. But these cases were misleading in that they had reference only to a very limited sphere. Thus, in *United States* v. *Aetna Surety Co.*,[26] the Court refused to add to the rigors of sovereign immunity "by refinement of construction where consent has been announced." But the case merely stands for the proposition that an insurer-subrogee may sue in its own name under the act. Again, in *United States* v. *Yellow Cab Co.*,[27] the Court stated that in view of the purpose of the act "it is inconsistent to whittle it down by refinements." But all the Court actually held there was that the Government could be impleaded as a third-party defendant.

However, by 28 January 1957, the date on which *Rayonier, Inc.* v. *United States* was decided, the thinking had apparently come full circle. In that case, speaking for seven members of the Court,[28] Mr. Justice Black said that "the very purpose of the

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[22] 346 U.S 15, 43 (1953).

[23] Mr. Justice Douglas and Mr. Justice Clark.

[24] Mr. Justice Black and Mr. Justice Frankfurter joined in the dissent.

[25] 346 U.S. at 60 (1953).

[26] 338 U.S. 366, 383 (1949).

[27] 340 U.S. 543, *550* (1951).

[28] Mr. Justice Reed and Mr. Justice Clark dissented.

Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish *novel and unprecedented governmental liability.*"[29] (Emphasis supplied.)

Similar indications may be found in the decisions of the lower federal courts. Although no complete uniformity of interpretation may be found at any given time, it may fairly be said that a majority of the earlier decisions under the act favored strict construction,[30] but that the liberal view is gaining in stature among the later decisions.[31]

B. *Potential Effects*

Should the possibilities inherent in this judicial turnabout be fully realized, its effects in many areas could be significant and far-reaching. An immediately apparent result would be a further increase in litigation against the Government as more and more potential litigants tend to become aware of their increased possibility of recovery. The combination of an increase in the number of suits and a greater percentage of successful suits against the United States due to liberalized interpretation of the provisions of the act would unquestionably impose an additional burden upon the United States Treasury.[32] In addition, an increase in the workload of federal agencies in the area of administrative settlement of claims under the act could be anticipated as a corollary to increased litigation. In this regard a fertile area for study and corrective action involves possible amendment of the act to increase the monetary jurisdiction of

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[29] 352 U.S. 315, 319 (1957).

[30] See in this connection Spelar v. United States, 75 F. Supp. 967 (E.D.N.Y. 1948); Turkett v. United States, 76 F. Supp. 769 (N.D.N.Y. 1948); Grace v. United States, 76 F. Supp. 174 (D. Md. 1948); Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949); Clark v. United States, 109 F. Supp. 213 (D. Ore. 1952); but see Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948) and Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951), where the language of the courts indicated a willingness to apply more liberal rules in interpreting the act.

[31] Gilroy v. United States, 112 F. Supp. 664 (D.D.C. 1953); O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953); Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955); Bulloch v. United States, 133 F. Supp. 885 (D. Utah, 1955); United States v. Alexander, 238 F. 2d 314 (5th Cir. 1956); United States v. Reid, 251 F. 2d 691 (5th Cir. 1958); Builders Corp. of America v. United States, ***supra,*** note **4.** One court advocated a judicial middle-of-the-road policy between retention and relinquishment of governmental immunity, which would result in a "consistent and equitable" application of the act "untrammeled by any rule of 'strict' or 'liberal' construction," Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

[32] This potential effect will be discussed in relation to specific problem areas.

administrative agencies and attain a more realistic apportionment of judicial and adminstrative settlements thereunder.[33]

C. *Creation* of *Problem Areas*

Since the passage of the FTCA constituted a departure from **a** legal theory which had been deeply ingrained in common law, it was perhaps inevitable that Congress should couch the provisions of this novel enactment in broad, general language. Unfortunately an equally inevitable result of this general language was the creation of numerous problems in interpretation which have plagued the federal courts in their implementation of the act. To gain an insight into the possible future application of the act, to measure its projected impact, it is necessary to analyze the reasoning of the federal courts in dealing with some of these problems of interpretation. Particular regard must be had for those pronouncements which indicate a change in legal concept or point to the development of a new legal theory in the construction of a specific provision or in the application of the act as a whole. The significance of these pronouncements must be weighed not only as they pertain to the individual problems involved, but also insofar as they indicate the precise position of the United States on the question of Government tort liability as compared with that of other countries in the Western world.

III. THE DISCRETIONARY FUNCTION EXCEPTION AND THE UNIQUELY GOVERNMENTAL THEORY

A. *Statement* of *the Exception*

The so-called "discretionary exception" provides an appropriate starting point for **a** discussion of specific problems of interpretation under the FTCA. This provision excepts from the application of the act "Any claims . . . based upon the exercise or performance or the failure to exercise or perform **a** discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[34] The federal courts have had some difficulty in applying this exception to specific fact situations.

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[33] *See* chapter **6,** *infra.*

[34] **28** U.S.C. § **2680 (1952).**

B. *Early Interpretation*

In keeping with their initial policy of cautious approach, the federal courts began by construing this provision strictly. In one early case, the alleged negligent act was the release from a Veterans' Administration hospital of a war veteran who had been hospitalized with a mental condition and who subsequently killed plaintiff's intestate. A district court applied the discretionary exception and stated that it was "elementary" that a statute relinquishing sovereign immunity should be literally and narrowly construed, and '(obvious" that an exception reserving part of that immunity should be liberally construed in favor of the Government.[35] Shortly thereafter an appellate court decided a case involving damage to plaintiff's land and crops by a river control project of the United States. This court followed the rule of strict construction, basing its action on the traditional meaning accorded by the courts to the words "discretionary function or duty," and on Congress' own intent, as indicated in the legislative history of the act, to preclude recovery of damages against the Government growing out of an authorized activity where no negligence was shown and the sole basis for suit was an invalid statute or regulation, or conduct which would have been tortious if performed by a private individual.[36]

The Suprem Court of the United States faced this question in *Dalehite* v. *United States,*[37] which was an action for damages under the act for death due to explosions of fertilizer with an ammonium nitrate base which was being exported under a Government program to increase overseas food supply. The explosion occurred on two ships and caused considerable loss of life and property damage. Basis for the suit was alleged negligence of Government agents in adopting the specific program, in controlling various phases of the manufacturing process, and in failing to police shipboard loading. A majority of the Supreme Court[38] felt that these actions were classically within the discretion exception, under which "it was not contemplated that the Government shoud be subject to liability arising from acts of

[35] Kendrick **v.** United States, 82 F. Supp. 430,431 (N.D. Ala. 1949).

[36] Coates **v.** United States, 181 F.2d 816 (8th Cir. 1950). Accord, Denny **v.** United States, 171 F.2d 366 (5th Cir. 1948) ; Old King Coal Co. **v.** United States, 88 F. Supp. 124 (S.D. Ia. 1949) ; Thomas **v.** United States, 81 F. Supp 881 (W.D. Mo. 1949).

[37] 346 U.S. 15 (1953).

[38] See notes 23 and 24.

a governmental nature or function."[39] Such acts were held to include not only the "initiation of programs and activities," but "determinations made by executives or administrators in establishing plans, specifications, or schedules of operations,'' and even acts of subordinates in carrying out the operations of government in accordance with official directions."[40] Under this theory, any time there was room for policy judgment and decision, there was discretion. This was strict interpretation indeed![41]

C. Development in Application

Two years later, the approach was different in the case of *Indian Towing* Co. v. *United States."* The United States Coast Guard had undertaken to operate a lighthouse on an island within the boundaries of Louisiana. Due to alleged negligence of Coast Guard personnel, the light in the lighthouse went out; it was not repaired nor was any warning given as to its nonoperating state. As a result, a tug ran aground and the cargo was lost. A majority of the Supreme Court[43] held the Government liable under the act. From a negative aspect, the opinion rejected the theory that the United States could never be held liable for negligent performance of '(uniquely governmental functions;"[44] on the positive side, it espoused the principle that despite the discretionary function exception, Government liability may be predicated on negligence at the "operational level of governmental activity."[45] Although the majority opinion indicated that sufficient differences existed between this case and the *Dalehite* case[46] to make them distinguishable, and thus tended to negate any substantial change in the interpretation of the act, this view was not accepted by lower federal courts following the *Indian Towing* case. An outstanding example is the case of *Fair* v. *United States;*[47] suit was brought

[39] 346 U.S. at 28 (1953).

[40] Id. at 35, 36.

[41] It has been suggested that the Court, in deciding Dalehite, was influenced to some extent by the magnitude of the claims involved. See James, Inroads on Old Tort Concepts, 15 NACCA L.J. 281, 294 (1955); 35 Tex. L. Rev. 620, 621 (1957). It is noteworthy in this connection that Congress later provided by statute for settlement of these claims, recognizing and assuming "the compassionate responsibility of the United States" for their payment (Act of August 12, 1955, ch. 864, 69 Stat. 707).

[42] 350 U.S. 61 (1955).

[43] See note 5.

[44] 350 U.S. at 64, 65 (1955).

[45] Id. at 64, 68.

[46] See note 37.

[47] 234 F. 2d 288 (5th Cir. 1956).

under the act for the death of three persons shot by an Air Force officer who had been released from a Government hospital pursuant to a discretionary decision by the medical staff at the hospital. The court considered that "*Indian Towing* Co. represents a definite change in attitude on the part of the Supreme Court."[48] It therefore concluded, *inter alia*, that "the Government is liable for the actions of its employees dealing directly with the public in the application of established policies even if such employees are vested with a measuer of discretion, . . ."[49] The current position of the Supreme Court is clearly illustrated in the case of *Rayonier, Inc. v. United States*,[50] where the United States was sued for property damage caused by negligence of employees of the Forest Service in fighting a fire. Seven members of the Court[51] agreed that Congress intended that losses caused by negligence of such employees should be "charged against the public treasury."[52] This opinion included an express disavowal of the *Dalehite* theory of Government immunity when acting in a "uniquely governmental capacity"[53] and incidentally upheld the possibility of United States liability for the negligence of its individual employees while acting as public firemen,[54] another departure from the *Dalehite* decision.

D. *Private Person Provision*

One of the paramount difficulties in evaluating federal court decisions under the FTCA arises from the fact that in most cases the courts will refer to more than one provision of the act in formulating their opinions and will discuss more than one principle of law in reaching their conclusions. This has been exemplified in many of the cases involving the discretionary exception, where the courts have allowed themselves to dwell at some length in their discussion on another provision of the act to the effect that the circumstances under which Government liability will be imposed will be those "where the United States

[48] *Id.* at 292.

[49] *Id.* at 294. To the same effect, see Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956); Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala 1958).

[50] 352 U.S. 315 (1957).

[51] See note 28.

[52] 352 U.S. at 320 (1957).

[53] *Id.* at 319; see also Dushon v. United States, 243 F.2d 451, 454 (9th Cir. 1957).

[54] 352 U.S. at 318 (1957).

if a *private person,* would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[55] (Emphasis supplied.)

E. *Uniquely Governmental Theory*

It is this provision which has given rise to the discussion of "uniquely governmental functions" in the *Dalehite, Indian Towing Co.,* and *Rayonier* cases, *supra,* as well as in many others. Three years before *Dalehite* the Supreme Court had considered the private person provision in a case involving a service-connected injury to a soldier. There the Court said that there was no remotely analogous liability of a private individual, since no private individual has power to conscript or mobolize a private army with command authority similar to that of the government.[56]

Thus, the early approach indicated in *Feres* and *Dalehite* was to interpret this provision as relieving the Government of liability in the performance of functions which, by their nature, would not be performed by a private person. This interpretation has been finally and firmly laid to rest in the clear language of *Indian Towing* Co. and *Rayonier* to the effect that the private person provision merely describes the type of liability to be imposed on the Government; it does not prescribe the limits for the operation of the act.

Since *Rayonier,* the lower federal courts have consistently rejected the "uniquely governmental'' immunity theory.[57] This development has found favor in law review comment.[58]

F. *Current Status*

The present construction of the discretionary function exception is clearly a liberal one. The courts tend to limit Government immunity on this ground to areas where the discretion was exercised on a high level of Government activity, but to break down the bars of recovery when the discretion involved is exercised by an individual employee or group of employees at the lower

[55] 28U.S.C. § 1346b.

[56] Feres v. United States, 340 U.S. 135,141.

[57] Dupree v. United States, 247 F.2d 819 (3d Cir. 1957); American Exchange Bank of Madison, Wisconsin v. United States, 257 F.2d 938 (7th Cir. 1958); Builders Corp. of America v. United States, 259 F.2d 766 (9th Cir. 1958); Russell, Poling and *Co.* v. United States, 151 F. Supp. 11 (S.D.N.Y. 1957); Smith v. United States, 155 F. Supp. 605 (E.D. Va. 1957); Big Head v. United States, 166 F. Supp. 510 (D. Mont. 1958).

[58] See 35 Tex. L. Rev. 620, 622 (1957); 34 Dicta 353, 355 (1957).

level of Government activity, the operational level, the level of direct association with the public—that public on whose interest and protection the whole concept of Government tort liability is founded.

While taking cognizance of the courts' departure from the strict construction of the past, it should be noted that there are some who argue for even greater extension of Government liability in this area. For example, one writer would permit the Government to invoke the discretionary exception only when the act or omission complained of was specifically directed for the advancement of a governmental objective, pursuant to discretionary authority provided by law.[59] Another writer feels that even the present construction carries immunity a great deal further than is needed to shield political and regulatory decisions from inappropriate judicial review.[60]

Perhaps there is deep significance in the blending of language outlawing the once proud "uniquely governmental" immunity theory with language recognizing congressional intent to charge the public treasury rather than the luckless injured individual for losses caused by negligence of Government employees even when the latter were exercising a measure of discretion. Perhaps this heralds an awakening of a greater sense of responsibility to the public than has heretofore been a part of national social policy. Perhaps United States judges are tending, not by design or conscious effort, but simply by the same evolution of thought which has taken place elsewhere, toward a general idea that the community, rather than the individual, should bear the burden of Government torts.

IV. SCOPE OF EMPLOYMENT

A. *Difficulties in Interpretation*

As indicated in discussing the general applicability of the FTCA, Government liability under its provisions is predicated on the negligent or wrongful act or omission of a Government employee "while acting within the scope of his office or employment."[61] The quoted clause has furnished the federal courts another area of difficulty and conflict in interpretation.

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[59] Peck, The Federal Tort Claims Act. A Proposed Construction of the Discretionary Function Exception, 31 Wash. L. Rev. 207, 225 (1956).

[60] James, The Federal Tort Claims Act and the "Discretionary Function" Exception; the Sluggish Retreat of an Ancient Immunity, 10 U. Fla. L. Rev. 184, 190 (1957).

[61] 28 U.S.C. § 1346b (1952).

B. *Line of Duty*

The act itself provides that " 'Acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty."[62] An early case in which this meaning was applied seemed to indicate that it would present no difficulty. There, a naval recruiting officer, on his way home in his own personal car on a Sunday morning, after participating in a recruiting radio broadcast, was involved in an accident which resulted in a suit against the United States by the other party to the accident. The court applied the statutory definition of scope of employment to the facts, found that the officer was not acting in the line of duty when the accident occurred and held that the United States was not liable.[63] However, it soon became apparent to the courts that application of this seemingly simplified definition of scope of employment to cases involving military personnel actually resulted in complicating the interpretation of this term, since it required one definition for military personnel and another for other Government employees. This problem was squarely met in a case where a woman standing on the sidewalk near a railroad station was knocked down and injured by a sailor who was running to board a troop train. The plaintiff's case rested on the bald principle that the sailor was acting in line of duty and therefore within the scope of his employment, making the United States liable. The court, however, read the "scope of employment" phrase in context with its companion provision that Government liability is limited to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[64] Following this rule, there was no liability in the employer under the law of Louisiana, where the act occurred, for acts of employees engaged in enterprises of their own. The court refused to apply a different, and inconsistent rule merely because the employee was a member of the armed forces.[65]

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[62] 28 U.S.C. § 2671 (1952).

[63] Rutherford v. United States, 73 F. Supp. 867 (E.D. Tenn., 1947), *aff'd*, 168 F. 2d 70 (6th Cir. 1948). See also Mackay v. United States, 88 F. Supp. 696 (D. Conn. 1949).

[64] 28 U.S.C. § 1346b (1952).

[65] United States v. Campbell, 172 F.2d 500 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949). See also O'Connell v. United States, 110 F. Supp. 612 (E.D. Wash. 1953).

This approach, seeking as it does a uniform measuring standard, certainly seems the more logical one. And yet this provision that "scope of employment" means "acting in line of duty" as to military personnel, is inescapably a part of the law and must be interpreted as having some meaning. What, then, does it mean? Some courts, at least, have concerned themselves with this question. For example, one court theorized that Congress merely felt that as to military personnel the term "line of duty" more correctly described action representing the Government than "scope of employment," but that there was no intent to broaden the application of the act by the use of this phrase.[66] Other courts have been content merely to refer to "line of duty" in the same breath with "scope of employment," with at least an implication that the meanings of the two are to equated to one another.[67]

C. *Federal and State Law*

The attempt on the part of some courts to apply the scope of employment provision in the light of other clauses in the federal statute is significant in that it brings into clear perspective another problem in interpreting this nebulous term. For such attempt has been construed to constitute an application of federal law in the construction of the act. This concept was expressed in ***United States*** v. *Sharpe*,[68] in which an Army sergeant was involved in a collision while driving his own car from one duty station to another. The court represented itself as relying on federal law as a basis for determining whether the wrongdoer was a Government employee acting within the scope of his employment and on local law to determine whether his act gave rise to liability. Similar reasoning has been adopted by other courts,[69] and the same conclusion was reached by at least one law writer.[70] Yet in many other cases involving scope of employment of Gov-

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[66] "United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949), ***cert. denied,*** 339 U.S. 903 (1950). See also Paly v. United States, 125 F. Supp. 798 (D. Md. 1954).

[67] E.g., Hubsch v. United States, 174 F.2d 7 (5th Cir. 1949).

[68] 189 F.2d 239 (4th Cir. 1951).

[69] E.g., Hubsch v. United States, *supra*, note 67; United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949), ***cert. denied,*** 339 U.S. 903 (1950); Parrish v. United States, 95 F. Supp. 80 (M.D. Ga. 1950); Bach v. United States, 92 F. Supp. 715 (S.D.N.Y. 1950)

[70] Gottlieb, State Law Versus a Federal Common Law of Torts, 7 Vand. L. Rev. 206 (1954).

ernment employees, the courts have taken pains to stress their unlimited and unequivocal reliance upon state law.[71]

The Supreme Court of the United States granted certiorari on this question in the case of *Williams* v. *United States*.[72] In that case, plaintiff was injured when struck by a military vehicle driven by a soldier who was on pass, drunk, and had no valid authorization to use the vehicle. The circuit court distinguished between the status of a civilian employee of the Government and that of a military person and decided that, although the California law of respondeat superior would apply to the civilian employee, the federal statute itself clearly limited federal liability for the torts of military personnel to acts committed in line of military duty; under this theory, the Government was not liable. The Supreme Court, per curiam, declared succinctly and definitely, "This case is controlled by the California doctrine of respondeat superior.'' The case was remanded for consideration in that light. Since that time in cases involving this issue, the circuit courts have consistently applied state law, frequently with a reference to the *Williams* decision.[73]

This, of course, was the approach of the appeals court in the rehearing on the *Williams* case, *supra*. There,[74] the court applied the California law of respondeat superior to the facts, to determine scope of employment. The basic facts, as the court found them, were that the injury which was the basis of the suit was caused by a soldier at a time when he was using a Government vehicle in clear violation of Army Regulations; as a result he was not within the scope of his employment, under California law, and there was no Government liability.;:

But how does this procedure differ from that followed in *Sharpe, supra?* There, the court said, "The Torts Claims Act adopts the local law for the purpose of defining tort liability,

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[71] E.g., Fries v. United States, 170 F.2d 726 (6th Cir. 1948); United States v. Wibye, 191 F.2d 181 9th Cir. 1951); Christian v. United States, 184 F.2d 523 (6th Cir. 1950); United States v. Johnson, 181 F.2d 577 (9th Cir. 1950); Murphey v. United States, 179 F.2d 743 (9th Cir. 1950).

[72] 350 U.S. 857 (1955), reversing 215 F.2d 800 (9th Cir. 1954).

[73] See the discussion of the Mraz, Hinson and Chapin cases, *infra*. See also Leonard v. United States, 235 F.2d 330 (10th Cir. 1956); Mandelbaum v. United States, 251 F.2d 748 (2d Cir. 1958); Voytas v. United States, 256 F.2d 786 (7th Cir. 1958).

"Williams v. United States, 248 F.2d 492 (9th Cir. 1957), *cert.* ***denied,*** 355 U.S. 953 (1958).

[75] **A** similar approach was followed in Holcombe v. United States, 259 F.2d 505 (4th Cir. 1958), where the court applied Maryland law in the light of Navy Regulations.

not for the purpose of determining the relationship of the Government to its employees."[76] The method used by the appeals court in the second hearing of the *Williams* case representd no substantive departure from this principle. The difference lay in the recognition by the latter court that in determining Government-employee relationship, it was not applying federal law as such to the issues before it, but was merely establishing the specific terms of agreement between employer and employee, an essential initial step in any case involving scope of employment.[77]

D. *Travel of Government Personnel*

The constraining effect of the Supreme Court's pithy pronouncement in *Williams, supra,* may be evaluated in specific connection with the most recent scope of employment problem facing the federal courts. One of the necessary evils of Government service is that personnel of various Government agencies are constantly moving from one place to another in connection with permanent changes of assignment. It is frequently true that the Government employee performs the necessary travel in his own personal vehicle and even in his own good time, interrupting his trip for various excursions of his own, all within the limits of competent authorization granted by his superiors. Now suppose in this atmosphere of temporary freedom from the worries and cares attendant upon Government service, the employee becomes careless and is involved in an accident causing personal injury or property damage to another. Is there a basis for Government liability in this situation? Is the employee acting within the scope of his employment? This question can only be decided on the basis of decisions after the *Williams* case, for since that holding, whenever scope of employment has been involved in a federal tort case, the circuit courts have used that case as their starting point.[78]

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[76] 189 F.2d 239 at 241 (1951).

"The same general line of reasoning was followed in Hopper v. United States, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd,* 214 F.2d 129 (6th Cir. 1954); Marquardt v. United States, 115 F. Supp. 160 (S.D. Cal. 1953); McConville v. United States, 197 F.2d 680 (2d Cir. 1952); Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C. 1955).

[78] It is interesting to note that the Supreme Court itself found occasion to mention federal law in a decision since Williams. See Hatahley v. United States, 351 U.S. 173, 180 (1956), in which the Court said "the federal agents here were acting within the scope of their employment under both state and federal law."

To begin with the cases, in *United States* v. *Mraz*,[79] an Air Force officer received orders changing his permanent duty assignment from California to New Mexico, directing travel as "necessary in the military service," and authorizing transportation either by commercial carrier or by privately owned conveyance. The officer and his wife departed by private automobile, made three stops along the way, then were involved in an automobile accident which gave rise to a suit against the Government. The court, citing the *Williams* case, applied the law of New Mexico, where the accident occurred, found that the officer was within the scope of his employment, and held the Government liable. The court's theory was that the officer was acting in furtherance of the Government's interest at the time of the accident, since he was performing necessary military travel without leave, and his time belonged to the Government. The opinion indicated that the result might have been different had he been on leave, with a mere duty to report to a certain place at a certain time, or had the accident arisen from the officer's own external, independent and personal motive. Similarly, Government liability was imposed in *Hinson* v. *United States*[80] where an automobile accident occurred while an Army officer was driving his own car to his first duty station from his home. This court, citing *Williams* and applying Georgia law, rejected the Government argument denying liability because of lack of control over the individual's manner or means of performing his task. The court felt that the officer's travel was a specifically assigned duty and that his freedom to choose a route and method of travel was immaterial.

A squarely opposite result was reached in *Chapin* v. *United States*.[81] The facts were similar to those in the *Mraz* and *Hinson* cases, except that an enlisted man was involved and his orders provided for four days' delay en route; however, if these factors had any influence on the decision, the opinion did not so reflect. The court, citing the ubiquitous *Williams* case and applying California law, decided that the soldier was not within the scope of his employment and that the Government was not liable. Most significant was the court's conclusion that the soldier's travel was not part of his assigned duties but was an act outside the control of the employer, the Government. The court recognized that the soldier's actions were peculiarly under the Government's control

[79] 255 F.2d 115 (10th Cir. 1958).
[80] 257 F.2d 178 (5th Cir. 1958).
[81] 258 F.2d 465 (9th Cir. 1958).

because of his military status, but felt that Government liability under the agency theory should be predicated only on conduct arising out of the employment relationship.

So it appears that, in applying state law, the courts of appeal have found no universal rule of application to cases of this kind and have found it necessary to construct their own framework of theory upon the existing foundation of the basic doctrine of respondeat superior. Thus the application of state law leaves the problem still unsolved. Torn between questions of control by the Government over the serviceman's conduct and questions of whether the Government's interest is being furthered during travel, the courts have already begun to reach contrary results and have indicated potential areas of disagreement in the evaluation of specific circumstances.[82] Thus, results may vary depending upon how much choice the serviceman is given as to method of travel, depending upon whether leave or delay is included within his orders, depending upon whether his own personal motives were guiding his activities at the time of an accident caused by his negligence. A foreboding aspect of a problem area every bit as perplexing as that of the discretionary exception, every bit as unpredictable, presents itself, unless the courts soon find a reasonable basis for uniform decision.

E. *Possible Basis* of *Uniformity*

What might be such a reasonable basis? t is suggested that it might lie in an unwinking acceptance of the fact that the relationship between the Government and its employees is unique. This is not limited to military personnel, but extends to all Government employees. The Government is not an ordinary employer, and it is an unrealistic and unnecessary fiction to consider it as such. It is like saying that because the United States has relaxed one of its sovereign rights, it should no longer be considered a sovereign. But this is absurd. The requirement that tort law be applied to the United States as it would to a private person certainly does not mean that the courts must pretend that the United States is not the United States! The question then should be: which best serves the interests of the United States in these cases, denial or imposition of Government liability? On the one hand, the Government would be protected from tort claims; but was it not the purpose of the act to permit tort claims against the Government? On

[82] For a discussion of these two tests of scope of employment, see 19 Ga. B.J. 382, 383 (1957).

the other hand lies the sense of responsibility to the public that has been discussed in connection with the discretionary function exception. Although the courts have not discussed the question precisely in this light, it seems to follow logically from a theory which has been advanced. In the *Mraz* case, *supra*, the court imposed liability because "the accident occurred while the officer was engaged upon Government business in furtherance of the Government's interest.[83] It is not going far beyond that language to say that whenever such an accident occurs, Government responsibility requires that the individual be relieved of resulting monetary burdens. Nor does it seem unlikely that courts would take that course, were one to lead the way, in the light of their expanding liberal treatment of the act.

Can the courts reach this result without departing from the state law requirement and without subjecting themselves to a charge of judicial legislation? The law writers are not in agreement. At least one feels that help from Congress is badly needed in this area.[84] Another categorically states that the courts do not follow local law in situations of this kind,[85] thus apparently accepting the judicial legislation. A third argues for an interpretation of "scope of employment" under which it would be taken as a mere reference to the fact that the Government can act only through its employees without any intent to limit Government liability under the doctrine of respondeat superior.[86]

But need any of these extreme measures or interpretations be adopted? It is certainly true that difficulties have arisen because the federal courts since *Williams* have been trying to apply state respondeat superior doctrines which varied from one another in interpretation and application. But is this not because the courts tried to apply state law to determine Government-employee relationship? The *Williams* case did not require that, and the Supreme Court impliedly so indicated by refusing certiorari on the second hearing in which the court first determined such relationship by scrutinizing appropriate regulations governing such employment, and then applied state law to the factual situation, one fact being the nature of the relationship. If the premise is accepted that the factual nature of the Government-employee relationship requires that the employee be held to be acting in

[83] 255 F.2d 115 at 118 (10th Cir. 1958).
[84] 10 Vand. L. Rev. 450,454 (1957).
[85] Chutkow, The FTCA and the Application of Local Law, 33 Dicta 321 (1956).
[86] Peck, Absolute Liability and the FTCA, 9 Stan. L. Rev. 433, 446–448 (1957).

furtherance of the Government's business while travelling under orders, without regard to circumstances of method of travel, delay en route status, etc., it is unlikely that any state law of respondeat superior could be construed to hold him outside the scope of his employment.[87] To illustrate with the *Chapin* case, *supra,* before holding that the soldier in question was outside the scope of his employment, the court found it necessary to make a specific finding that the federal government, acting as an employer in its military capacity, should be treated just like any private employer.[88] Had the court been able to decide this factual question differently on the basis of the Government-employee relationship, the ultimate result would have changed.

It appears that Government agencies have it within their power to assist the courts in reaching the appropriate factual determination, by formulating regulations which would clearly provide that the employee was engaged in Government business while performing travel in connection with movement orders. Coordination of such regulations among Government agencies would permit resolution of controversial questions of the employee's status on a uniform basis. This would provide the courts with a definitive expression of the precise relationship existing between the Government and its employees, to which the court could turn in making its findings of fact, as the court did in the second *Williams* hearing.

V. THE LAW OF THE PLACE

A. *Statutory Provision*

As indicated in the previous chapter, state law plays a material part in the implementation of the FTCA. This stems from the language of the act itself,[89] which provides for determination of Government liability "in accordance with the law of the place where the act or omission occurred."[90]

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[87] There is authoritative basis for the principle that an employee may be within the scope of his employment while acting in part for his own purposes. Sec. 236, Restatement, Agency (1958) states this principle and comments "The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service. . . ."

[88] 258 F.2d 465 at 468 (1958).

[89] 28 U.S.C. § 1346b (1952).

[90] This provision differs from the prevailing conflict of laws rule. See § 377, Restatement, Conflict of Laws (1934). But a court recently resolved this difference by applying the doctrine of renvoi. See Hess v. United States, 259 F.2d 285 (9th Cir. 1958), *cert. granted,* 27 L.W. 3243 (Mar. 2, 1959).

B. *Areas Under United States Exclusive Jurisdiction*

Another difficulty of interpretation arises when a tort is committed in an area under the exclusive jurisdiction of the United States. Recently, an action was brought under the FTCA for personal injuries resulting from a fall on steps leading to an entrance of a post office building which was under such exclusive jurisdiction, although physically located in Wisconsin. The claim of negligence was predicated on noncompliance with a Wisconsin Safe Place Statute requiring handrails on the steps of public buildings. The district court held the statute to be inapplicable,!" but the court of appeals reversed the judgment and applied the statute, holding pertinently that the federal government had consented, under the FTCA, to the same liability as the state imposes on private persons.[92]

A similar result had been reached in an earlier case where the same court of appeals applied an Illinois safety statute in an area ceded to the United States by Illinois.[93] There the court said that the United States would be liable under the private person provision "whether the negligent or wrongful act is committed on a military reservation, at a veterans' hospital, a post office building, or on a city street."[94] This court found logical justification for its result in the desirability of a uniform standard of liability, and in the fact that, if it were held otherwise, areas under United States exclusive jurisdiction would be no man's land with no legal system for the adjudication of private rights.[95]

But it appears that there are considerations which the court may have overlooked. First, the places where the acts or omissions occurred in these cases, although physically within the boundaries of Wisconsin and Illinois, were areas under the exclusive jurisdiction of the United States. Thus the question is: what would be the liability of a private person in such an area? Second, such areas are not left without laws regulating private rights. For in such cases, the state laws continue in force, as far as is consistent with federal law, until abrogated or altered by the United States.[96]

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[91] Williams v. United States, 145 F. Supp. 4 (W.D. Wisc. 1956).

[92] American Exchange Bank of Madison, Wisconsin, v. United States, 257 F.2d 938 (7th Cir. 1958).

[93] Stewart v. United States, 186 F.2d 627 (7th Cir. 1951).

[94] *Id.* at 630.

[95] *Id.* at 631.

[96] Chicago, Rock Island and Pacific Ry. Co. v. McGlinn, 114 U.S. 542 (1885). See also James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

There is a federal statute which expressly adopts as federal law, for areas under the exclusive jurisdiction of the United States, the local law of liability for negligence and wrongful death.[97] But this statute has definite limitations. It has no application to property damage, and there is indication, both in the House report[98] and in the congressional debate on the act prior to passage,[99] that is was intended to apply only to death cases. The courts have not been helpful in construing the act's intent; dicta in some cases has indicated that it does not cover injury cases,[100] while other courts have assumed without deciding, that it does include such coverage.[101]

Apart from this statute, what would be the liability of a private person for torts committed under these circumstances? It has been held that one individual may sue another for personal injuries suffered on a reservation under the exclusive jurisdiction of the United States, either in a state court[102] or in a federal court.[103] When suit is brought in a federal court, the law to be applied is not state law as such, but the substance of state law, which has remained operative as federal law on cession of the area by the state to the United States.[104] Under the FTCA, United States liability should be determined in the same manner, viz., in accordance with the federal law, which has been derived from state law, including, in the instant cases, the state safety statutes.

C. *Res Ipsa Loquitur*

The "law of the place" provision has also created problems in the application of some basic principles of tort law. One such principle is res ipsa loquitur.[105] The federal courts have frequently

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[97] Act of Feb. 1, 1928, 45 Stat. 54 (1928), 16 U.S.C. § 457 (1941).

[98] H.R. Rep. No. 369, 70th Cong., 1st Sess. 1 (1927).

"58 Cong. Rec. 2052 (1919) (Injuries in Places under Federal Jurisdiction).

[100] Murray v. Gerrick & Co., 291 U.S. 315 (1934) ; Pound v. Gaulding, 237 Ala. 387,187 So. 468 (1939).

[101] Whitmore v. French, 37 Cal.2d 744, 235 P.2d 3 (1951) ; State v. Rainier National Park Co., 192 Wash. 592, 74 P.2d 464 (1937) ; Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd,* 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[102] Ohio River Contract Co. v. Gordon, 244 U.S. 68 (1917).

[103] Mater v. Holley, 200 F.2d 123 (5th Cir. 1952).

[104] *Id.* at 124.

[105] Under this theory, an inference of negligence is raised against a defendant who had exclusive control of the instrumentality causing an injury under circumstances where injury does not ordinarily occur in the absence of negligence, and the plaintiff did not contribute in any way to his injury.

applied this rule in cases arising in those jurisdictions where its applicability is recognized. Thus, a passenger in a navy vehicle, injured when the car overturned during an official errand, recovered against the Government under this theory as applied in Guam.[106] In a case where plaintiffs' lands were deprived of water because of breaks in a canal of an irrigation project constructed by the Government, the court based its decision on the application of res ipsa loquitur in Oregon.[107] Another court applied Massachusetts law to hold the Government liable under this doctrine when a postoffice window fell on a customer's hand.[108] There is a recent trend to apply the doctrine to airplane accidents.[109]

D. *Special Problems in Government* Cases

Difficulties arise in this area where the uniqueness of governmental functions and governmental requirements again come to the fore. In a suit for damages caused by the falling of flaming fuel from an air force plane which had exploded over plaintiff's property in Florida, plaintiff relied upon these facts alone and the doctrine of res ipsa loquitur. The court refused to apply res ipsa loquitur on the dubious ground that it had no knowledge of what would cause a jet airplane to explode in mid-air while in flight and that therefore there was insufficient basis for the presumption, necessary to the application of this doctrine, that such an accident would not have occurred in the ordinary course of events if the defendant had exercised due care.[110]

On somewhat similar facts, however, another federal court reached a different result. A civilian instructor was killed in a head-on crash of two air force planes during training maneuvers in Oklahoma. The Government refused to make its record of investigation available at the trial and the court seized upon this fact to apply res ipsa loquitur based on the fact that the plaintiff had no knowledge of the cause of the accident and was compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence.[111] So here, lack of knowledge was the basis for recovery,

[106] United States v. Johnson, 181 F.2d 577 (9th Cir. 1950).

[107] White v. United States, 193 F.2d 505 (9th Cir. 1952).

[108] United States v. Hull, 195 F.2d 64 (1st Cir. 1952).

[109] United States v. Kesinger, 190 F.2d 529 (10th Cir. 1951); Sapp v. United States, 153 F. Supp. 496 (W.D. La. 1957).

[110] Williams v. United States, 218 F.2d 473 (5th Cir. 1955).

[111] O'Connor v. United States, 251 F.2d 939 (2d Cir. 1958).

whereas in the Florida case, *supra,* lack of knowledge precluded recovery.

E. *Atomic Energy Cases*

It is easy to see how this problem may be compounded in a case involving atomic energy and nuclear detonations. Such a situation arose in ***Bartholornae Corp.*** v. ***United States,***[112] where the plaintiff's ranch buildings were allegedly damaged by atomic detonations 150 miles away. Among other theories of Government liability, the plaintiff alleged res ipsa loquitur. This claim the court blithely swept aside in a footnote, stating that the evidence did not establish what "thing" caused the cracked plaster in the plaintiff's buildings, and that this type of accident was not unusual, but one which ordinarily occurs in the absence of negligence. It is not unreasonable to assume that future atomic explosion cases will arise where the courts will be compelled to face the problem of res ipsa loquitur somewhat more realistically.

F. *Absolute Liability*

The court in the ***Bartholomae*** case did permit itself to deal a little more seriously with another facet of tort law which was relied upon by the plaintiffs, viz., that of absolute liability.[113] This theory had been before the federal courts prior to the ***Bartholomae*** decision. In ***Dalehite*** v. ***United States,*** which has been discussed in other areas (see Parts II and 111, and notes 22 and 37), the Supreme Court of the United States expressed the opinion that absolute liability could not be imposed upon the United States under the act by virtue of its ownership of an inherently dangerous commodity, or of engaging in an extrahazardous activity. The Court felt that since the act could be invoked only on a negligent or wrongful act or omission of a Government employee, it simply did not extend to the theory of absolute liability without fault.

G. *Rule Generally Applied*

Lower federal courts have generally followed this phase of the ***Dalehite*** case, with one apparent exception, and with occasional

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[112] 135 F. Supp. 651 (S.D. Calif. 1955), *affd,* 253 F.2d 716 (9th Cir. 1957).

[113] Under this doctrine, one who permits a highly dangerous instrumentality or agency which is located on his property and is under his control to escape and damage another is liable for the damage irrespective of negligence or fault.

indications of reluctance. For example, in *United States* v. *Ure*,[114] involving a break in an irrigation supply canal operated by the United States, resulting in flooding of plaintiff's land, the appeals court felt constrained to overrule a district court decision,[115] which had held the United States liable under the absolute liability doctrine. The court of appeals made it clear that the district court had followed Oregon law, but that the *Dalehite* case precluded the application of the basic principle. Other courts have been content with a simple statement indicating that *Dalehite* controls in this field.[116]

H. *One Situation Distinguished*

In *United States* v. *Praylou*[117] one appeals court distinguished *Dalehite* in order to hold the Government liable in a situation involving absolute liability. There, damages were caused by a government airplane which fell and exploded on plaintiff's premises. A state statute imposed absolute liability on owners of aircraft causing injuries, irrespective of negligence. The state act left no room for an action in negligence, since the absolute liability was the only one that the law prescribed. The court said that application of *Dalehite* here would lead to the absurd conclusion that the Government could not be held liable for damage by its employees merely because state law imposed absolute liability for such damage and not merely liability for negligence. Thus the court did not actually say the Government was absolutely liable, but merely that the Government was liable for negligence under the act, despite the fact that state law limited liability to the absolute variety. It should be noted, however, that in this case the court merely refused to apply the *Dalehite* rule to all situations regardless of circumstances. It made no pretense of complete rejection of the *Dalehite* theory. As a matter of fact, the same circuit court, in a subsequent case,[118] affirmed the finding of a district court[119] which had followed the *Dalehite* rule and refused to impose absolute liability on the Government for injury caused by the explosion of a fuse which plaintiff had picked up in a field near his home.

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[114] 225 F.2d 709 (9th Cir. 1955).

[115] Ure v. United States, 93 F. Supp. 779 (D. Ore. 1950).

[116] E.g., Harris v. United States, 205 F.2d 765 (10th Cir. 1953); Rayonier, Inc. v. United States, 225 F.2d 642 (9th Cir. 1955).

[117] 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954).

[118] Porter v. United States, 228 F.2d 389 (4th Cir. 1955).

[119] Porter v. United States, 128 F.Supp. 590 (E.D.S.C. 1955).

I. *Nuclear Test Cases*

The question of absolute liability in nuclear test cases arose in *Bulloch* v. *United States,*[120] where suit was brought for damages to sheep herds allegedly caused by government-conducted atomic experiments. The court recognized the existence of a rule of absolute liability in Utah in situations involving damage caused by explosion. Then, citing the *Praylou* case, *supra,* the court said: "The fact that an absolute liability under state law may be imposed against individuals for certain dangerous activities does not relieve the Gevornment from liability under the Tort Claims Act where negligence thereby required is established."[121] Thus the court at least by inference indicated that absolute liability would not be imposable against the Government.[122] In the *Bartholomae* case, *supra,* (see note 112), the district court stated unequivocally that the FTCA is to be invoked only on a negligent or wrongful act or omission of an employee, and that recovery against the Government would not be founded on a theory of absolute liability without fault. The court of appeals, without any discussion beneficial on this question, affirmed the finding.

J. *Negligence Per Se*

The application of state law under the FTCA has occasionally brought the federal courts into the area of negligence per se. This is distinguished from absolute liability in that it results from a breach of a positive standard of conduct, generally imposed by statute, whereas absolute liability is imposed under specified circumstances without regard to the breach of any duty.[123]

Federal courts have applied negligence per se to the act of a soldier on guard duty in shooting at a civilian who was attempting to escape from arrest, and wounding an innocent bystander;[124] to the unauthorized departure by airlines pilots from an air traffic pattern published by the Administrator of Civil Aeronautics, which resulted in a collision with another plane;[125] to non-compliance with a North Carolina statute requiring the display of warning signals when a truck is disabled on a highway;[126] and to viola-

[120] 133 F. Supp. 885 (D. Utah 1955).
[121] Id. at 89.
[122] Similar reasoning was employed in Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955).
[123] Lavelle v. Kaupp, 240 Minn. 360,363, 61 N.W.2d 228 (1953).
[124] Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948).
[125] Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955).
[126] Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954).

tion of an Oregon statute by setting and use of poison ejecting device for coyotes.[127] On the other hand, one court, applying Oklahoma law, found that violation of a statute requiring that vehicles be driven on the right side of the road was not negligence per se, but only prima facie evidence of negligence.[128] So, again, variability of state law precludes uniformity of result.

K. *Conclusions*

What conclusions can be drawn, then, from the result of claims under the act which involve these basic tort principles? Is the courts' approach in this area consistent with their current liberal tendencies elsewhere? Of course, as indicated, ***supra,*** their decisions in these cases are necessarily affected by the requirement that state law be applied. Further complication results from the fact that res ipsa loquitur and absolute liability questions will generally both be involved in the same case, together with the problems relating to scope of employment, discretionary functions, etc. As a result, it is somewhat difficult to isolate with certainty the major basis for the court's ruling. On this point, an extremely interesting statement is found in the dissenting opinion of a case involving injuries caused by the explosion of an air force plane after some unauthorized and highly dangerous maneuvers by the pilot. The majority opinion discussed assault,[129] absolute liability, the "private person" theory, and the rule of state law application before finally deciding in favor of the Government on the basis of scope of employment.[130] But, although this opinion quoted from both Tennessee decisions and the Tennessee Code, the dissenting judge felt that "no binding Tennessee precedent" required the majority to reach its decision, and that the court was free to "apply its own independent reasoning to reach the substantial justice of the case,[131] which in his opinion was against the Government. This statement indicates how federal courts may be guided by the equities of a given situation in their application of the complicated provisions of the act.

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[127] Worley v. United States, 119 F. Supp. 719 (D. Ore. 1952).

[128] Woods v. United States, 228 F.2d 734 (10th Cir. 1055).

[129] In 28 U.S.C. § 2680 (1952), the act exempts from its provisions assault and certain other specific torts. This exception, together with a number of others included in that section, are either of very limited application or present no major difficulties in interpretation. Accordingly, their discussion would be of little value here.

[130] United States v. Taylor, 236 F.2d 649 (6th Cir. 1956).

[131] *Id.* at 656.

However, to return to more solidly supportable conclusions, it seems clear that, while federal courts will willingly apply the doctrine of res ipsa loquitur or the principle of negligence per se when justified by applicable state law, they are not ready to impose absolute liability on the Government even when absolute liability is the rule of state law. There is reasonable basis for such distinction. Under the act, Government liability must be predicated on the wrongful or negligent act or omission of a Government employee. Neither res ipsa loquitur nor negligence per se does violence to this provision. The former raises a presumption of negligence, the latter places a certain course of conduct in the category of negligence, But in both instances the courts are merely looking to local law to provide assistance in determining whether a negligent act has in fact been committed. This procedure conforms to the provisions of the act, and at the same time fully accords with a policy of liberal construction.

Absolute liability presents a different picture. Of course, there is the possibility, as indicated in ***Ure,*** *supra,* that lower federal courts generally refuse to apply absolute liability under the act because they are reluctant to differ with the Supreme Court's definitive expression on the subject in ***Dalehite.*** (As a matter of fact, prior to ***Dalehite,*** two district courts[132] and one circuit court[133] had shown inclination to apply absolute liability to the Government.) But if this is the reason, it is susceptible of attack. The Supreme Court has changed its views on many other questions discussed in ***Dalehite,*** and the language on absolute liability really amounted to dicta.

It is far more likely that the courts' hesitation to apply absolute liability against the Government is that basic requirement that liability be based on a provable negligent or wrongful act or omission of a Government employee. Only the *Praylou* case has threatened to limit this principle, and as indicated, *supra,* its holding did not constitute a frontal attack upon this aspect of ***Dalehite.*** But, since *Praylou,* there has been considerable discussion among the law writers on the question whether the language of the act would permit the federal courts to apply absolute liability even if they wanted to. One recognized authority has answered this question in the negative.[134] He based his conclusion

[132] Boyce v. United States, 93 F. Supp. 866 (S.D.La. 1950); Parcell v. United States, 104 F. Supp. 110 (S.D.W.Va. 1951).

[133] United States v. Gaidys, 194 F.2d 762 (10th Cir. 1952).

[134] Seavey, "Liberal Construction" and the Tort Liability of the Federal Government, *67* Harv. L. Rev. 994,998 (1954).

on the fact that the act waives immunity only for negligent and wrongful conduct, not for all "tortious conduct'' which would include strict liability. Sharing this conclusion, another writer found solid basis for the ***Dalehite*** holding in the statute itself and called for amendatory legislation to impose liability in appropriate cases, e.g., when an ammunition dump explodes, or when a military plane falls on a house.[135]

But what of the other side of the coin? Has any theory been advanced under which the courts could apply absolute liability on the Government without congressional amendment to the act? One writer has scanned all the orthodox legal indicia of statutory interpretation and concluded that nothing in the cases, legislative materials, or language of the act itself bars imposition of absolute liability. This author laid particular stress upon the fact that strict liability was not included in the act's specific exemptions.[136] Another, already cited in the discussion of scope of employment,[137] has spelled out a specific construction of the legislative language which would permit application of absolute liability. Not only would the limitations of respondeat superior be swept away, as indicated in that discussion, but the term "wrongful act" would be broadened to signify "tortious conduct" and thus include risks of unintended and unpreventable harm, or in short, harm brought about without fault.[138] This would be justified by the risk-bearing capacity of the Government.[139]

Despite the lack of agreement as to its proper method of accomplishment, the concept that the rule against absolute Government liability should be relaxed has often been expressed, e.g., in that forthright dissenting judge's opinion in the *Taylor* case, *supra.* He felt that "earth-dwellers" should be afforded "compensatory protection from falling airplanes."[140] A similar thought was expressed in a recent case note on *Taylor*, hoping that future

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[135] Davis, Tort Liability of Governmental Units, **40** Minn. L. Rev. **751, 791, 810 (1956).**

[136] **45 Ky.** L.J. **518 (1957).**

[137] Peck, *supra,* note 86.

[138] *Id.* at **445.**

[139] It is interesting to note that this writer predicted that the Supreme Court, on certiorari in the Taylor case, *supra,* would approve Praylou, *supra,* and limit or reject Dalehite, if the Court reached the question of absolute liability. Actually, all the Supreme Court did on certiorari was deny the motion to remand the case and refer it to the lower court for consideration of the settlement agreement involved therein. There was no discussion of absolute liability. (Taylor v. United States, **353** U.S. **956** [1957]).

[140] United States v. Taylor, *supra,* note **130** at **655.**

litigation might "provide relief wherever possible under the act to persons on the ground injured as a result of negligent flying."[141] Another law note has raised the "social" question whether society would best be served by placing the burden on the taxpaying public regardless of fault on the principle that the Government is the "best of all possible risk spreaders."[142] Thus again appears the idea of community, rather than private responsibility. But this is only the philosophical language of the law review. The courts have not yet reached this point in the realm of absolute liability.[143]

VI. THE ACT TODAY AND TOMORROW

A. *Continued Liberalization Likely*

The questions discussed in the preceding sections do not exhaust the field of litigation and potential litigation under the FTCA. But they include the most significant and the most perplexing problems which have arisen and through them may be traced the development of judicial thought in relation to the act from its initial stages to its present status. This development has clearly been in the direction of a wider and ever-expanding Government liability.

This evidence does not go so far as to indicate that the United States stands today on the threshold of an era of complete rejection of Government immunity. It is not likely that this country will shortly join hands with France in holding the public service defective in every instance where an individual is injured at the hands of someone who happens to be performing a public function, without regard to fault. Yet the embryo of such a body of law can be detected in the cases, struggling for strength to establish a recognized existence of its own. Whether it will come to full growth or be snuffed out by an environment of hostility to a theory so closely resembling social insurance is a secret that only the future can reveal. But it cannot be denied that there are clear and definite signposts pointing toward a continued liberalization of judicial interpretations and policies in the implementation of the act, and the end of the road is not yet visible. Seeds have been sown which have already begun to flower in cases such as *Indian*

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[141] 24 Tenn. L. Rev. 1062,1066 (1957).

[142] 45 Ky. L.J. 518, 527 (1957).

[143] "But one law note pictures imposition of absolute liability as the possible next step in the liberal trend. See 8 Syr. L. Rev. 277, 280 (1957).

Towing Co., Rayonier, and *Praylou,* and the extent of the harvest cannot yet be predicted.

D. *Legislative Revision V. Judicial Interpretation*

The liberal approach seems consistent with the very nature of the act, the creation of Government liability where none existed before. Accepting this premise and conceding that a dozen years is not an unreasonable time in which to work out the proper basic approach to an enactment which was so long in the making, a question remains as to which federal arm should solidify this concept. Should Congress now enact a new law, more definite in its provisions and in the expression of its aims, or should the matter remain in the hands of the federal courts under the existing law? Proponents of both sides may be found among the law writers. **A** champion of court action has said, "The argument . . . that the abrogation of sovereign immunity is entirely a legislative question is merely an easy way of enabling our judiciary to avoid performing their duty."[144] **A** note-writer who favors congressional action says, "It seems far better for Congress to make exceptions in light of its knowledge of expected budget commitments, than for the courts to do so."[145]

C. *Function of the Courts*

The resolution of this difference of opinion probably lies, as is so often the case, somewhere in the middle. Certainly the courts must achieve the day-to-day results by applying the law to the situations which arise in litigation. This they have been doing, and if there has been conflict, it was to be expected as a natural result of the novelty of sovereign tort liability in United States law. Definite policies are making their appearance and consistency is becoming more the rule. Complete uniformity can never be accomplished in view of the endless chain of case patterns possible under the act.

The FTCA by its nature tends to preclude a detailed legislative delineation of its every application. Should Congress now attempt such a task, the courts would be carried back to a repetition of the early days of the current act, when all provisions would require judicial interpretation and every question, new because the act was new, would require cautious initial approach. Congress has

[144] **Schwartz, Public Tort Liability in France, 29 N.Y.U.L. Rev. 1432, 1461 (1954).**

[145] **35 Nebr. L. Rev. 509,515 (1956).**

at least tacitly recognized this in making no major changes in the problem areas discussed despite inconsistencies in court applications, leaving it to the judiciary to arrive at the solution in the time-honored arena of adversary procedure.

D. *Function of Congress*

This view does not tie the hands of Congress. Whenever it appears that an amendment will assist or simplify the work of the courts, Congress is free to enact it, and in fact has already done so in a few instances.[146] One such possible amendment might expand the jurisdiction of administrative agencies in implementing the act. The statute currently provides for administrative adjustment of claims of $1,000.00 or less by the head of each federal agency.[147] Were this to be increased by Congress to $5,000.00 or more, perhaps up to $25,000.00, it requires no argument to perceive that the workload of the federal courts under the act would be proportionately lessened. These agencies must of course look to the law as applied by the courts in making the determinations necessary for such adjustments. It may well be that Congress initially limited the administrative agencies' jurisdiction so drastically in view of the lack of legal precedent on which to base their decisions. If so, this impediment no longer exists.

Such an amendment would not be the first of its kind by any means. Congress has recently taken action of this nature in regard to the Military Claims Act,[148] increasing the authority of the Secretaries of the military departments to settle claims under the act from a monetary limitation of $1,000.00 to one of $5,000.00. This increase was based upon such considerations as the decrease in purchasing power of $1,000.00 since the enactment of the act, the large amounts of administrative settlement possible under legislation involving other military claims,[149] and the probability that large claims may result from accidents or incidents involving the military services under present-day conditions. These arguments apply with equal force to the FTCA.[149a] FTCA.[149a]

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[146] For an enumeration of the amendments to the FTCA, see Gerwig, A Decade of Litigation under the Federal Tort Claims Act, 24 Tenn. L. Rev. 301 (1956).

[147] 28 U.S.C. § 2672 (1952).

[148] 10 U.S.C. § 2733 (1958).

[149] Foreign claims ($15,000.00), admiralty claims ($1,000,000.00), and claims under international agreements (no specific limitation).

[149a] Since the writing of this article, the monetary limitation upon administrative settlement has been amended to $2,500.00. Pub. L. No. 86–238, 86th Cong., 1st Sess. (8 Sep 1959).

E. *Cooperative Effort* of *All Branches of Government*

Implementation of the FTCA in this manner will make the act a model of effective action under the constitutional processes of the United States by the cooperative effort of the three branches of Government. The judicial branch will continue to apply the act in the tenor of the times, in keeping with the broad purpose of its enactment, to permit recovery in tort against the Government. The legislative branch, having brought the vehicle for such recovery into existence, will assist in its implementation by adding such amendments as may be appropriate, meanwhile standing ready to provide any necessary checks and balances in the unlikely event that liberal construction transcends national social bounds. The executive branch, through its administrative agencies, will assume its share in the effectuation of the act, according to the measure allotted to it, guided by the moving principles embodied in its legislative enactment and judicial interpretation.

THE UNITED STATES DISCIPLINARY BARRACKS SYSTEM

BY LIEUTENANT COLONEL RALPH HERROD*

"Pending completion of appellate review, the prisoner will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas."

I. INTRODUCTION

So read the concluding lines of the convening authority's action wherein, in accordance with pertinent departmental regulations, a branch United States Disciplinary Barracks is designated as the place of confinement.[1] With the promulgation of the initial Genearl Court-Martial Order, the record of trial by general court-martial is transmitted to The Judge Advocate General of the Armed Force concerned, and the adjudged prisoner[2] is transferred to the designated disciplinary barracks.

This article is not intended to be a treatise on the intricate techniques of a confinement facility. It is intended to clarify and interpret the broad provisions of the Department of Defense Instruction entitled "Uniform Policies and Procedures Affecting Military Prisoners and Places of Confinement"[3] as pertinent to Army male prisoners confined in United States Army-operated disciplinary barracks and to answer many questions asked by judge advocate officers on the subject.

The United States Disciplinary Barracks and its branches are authorized by Title 10, United States Code, section **1451,** et seq. Each disciplinary barracks is under the command of the **Con**tinental Army Commander within whose jurisdiction it is **located.**[4]

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[1] AR *633–5,4* Sep *1957.*

[2] *Id.* par. *2e.* An enlisted military person or civilian in confinement pursuant to sentence by a court-martial which, as approved by the convening authority, includes confinement which has not been ordered executed and is awaiting completion of appellate review.

[3] Department of Defense Instructional Letter entitled *Uniform* ***Policies and Procedures Affecting Military Prisoners and Places*** of ***Confinement*** dated *14* Jan *1955.*

[4] Par. *4b,* SR *210–185–1, 31* May *1951,* as amended.

The Commandant of a disciplinary barracks is designated for the Department of Army by The Provost Marshal General with the appointment being consummated by the pertinent Army Area Commander.

The mission of a disciplinary barracks as the custodian of Army and Air Force prisoners is to promote their reformation and rehabilitation with a view to their honorable restoration to military duty or return to civil life as useful citizens. Discipline in a disciplinary barracks is adminstered on a corrective rather than punitive basis. There is no "rock pile." Assigning tasks that serve no useful purpose is prohibited as is making prisoners hold arms in a folded position, or in an extended, strained position, for prolonged periods; use of the lock step; clipping prisoner's hair to a length of less than five-eighths of an inch (except for medical reasons); requiring silence at meals (except while at attention or as a temporary measure); use of the ball and chain or irons (except for the purpose of safe custody); or other cruel or inhumane treatment such as flogging, branding, tattooing the body, or any other punitive measures not specifically authorized by regulations.

Upon arrival at the diciplinary barracks, the prisoner's commitment papers are examined. To be accepted, the prisoner must have six months or more remaining on his sentence to confinement.[5] The confinement of prisoners in a disciplinary barracks pending trail by court-martial is not authorized, unless such prisoners are serving previously adjudged court-martial sentences.[6] Officer prisoners are not confined in a disciplinary barracks.[7] However, once his status changes from that of an officer-prisoner to that of a sentenced prisoner, the individual may be transferred to a disciplinary barracks for confinement therein.

The prisoner's commitment papers having been found to be in order, the prisoner is given a preliminary medical examination, fingerprinted and photographed. Valuables and personal property (including his record of trial by court-martial) are inventoried and placed in an individually sealed container, which is filed in the Personal Property Section. He is given a haircut,[8] issued

[5] Par. *4b*, **AR** *633–5*, **24** Sep *1957*, as changed by C 3, *11* Feb *1959*.

[6] *Id*. par. *3d*.

[7] *Id*. par. *4b (3)*.

[8] There is no prescribed type of cut. Thereafter, each prisoner receives a hair cut at the disciplinary barracks barber school at two-week intervals. There is no charge made for the hair cuts.

special clothing,[9] and is assigned to the Reception (quarantine) Barracks. The purpose of such segregation is three-fold: to discover any contagious disease; to assist the prisoner in his transition and orientation to life in a penal institution; and to study and observe him under controlled conditions and complete his orientation.

During this particular phase, one of the most important documents to confinement authorities is the staff judge advocate's review. For the first few weeks after the prisoner's arrival, the staff judge advocate's review, along with the General Court-Martial Order and the previous confinement officer's report, is the only information available, other than the accused's own story concerning the reason for his incarceration. The review furnishes an impartial summary of personal background information from both the military and civilian standpoint. The comments of the staff judge advocate as to a man's potentialities for restoration are a weighty factor in determining his immediate future.

The disciplinary barracks does not directly receive a copy of the prisoner's record of trial. The prisoner's individual copy is sometimes retained by him in his personal property file, but frequently he has destroyed it or mailed it to his home. If retained in his personal property file, no person has access to it without the prisoner's consent.

Following the initial phase of the processing procedure, the prisoner is scheduled for a series of orientation lectures and interviews with members of the professional staff, i.e., the Education Officer, Chaplain, Judge Advocate, Social Worker, Psychologist, Psychiatrist, and Medical Officer. During this phase of processing, members of the educational staff interview him and administer aptitude and intelligence tests. An educational folder is prepared, and the prisoner given preliminary educational and vocational counseling. He is interviewed by the Chaplain with respect to his religious background, advised of the church services available and invited to participate in the various religious programs offered. The Judge Advocate's orientation consists of a resume of the court-martial appellate procedures prescribed by the Uniform Code of Military Justice. Approximately 90 percent of the prisoners arriving at the disciplinary barracks are in an adjudged (appellate review not completed—sentence not finalized) status. It is absolutely essential that each prisoner be given the

[9] Shirt and trousers (wool or khaki); HBT work uniform. All outer garments are of a "seal brown" color and bear the initials "USDB."

same factual lecture; any and all false rumors be dispelled; and that erroneous information previously given by well-meaning "guard-house" lawyers be corrected. In addition, Board of Review decisions, in many cases, have been forwarded to the disciplinary barracks prior to the arrival of the prisoner. These are immediately served on him, and he is counseled by a lawyer regarding the apparent merits of his case as well as his rights to petition the Court of Military Appeals for a grant of review.

The Social Worker prepares a background paper on the prisoner which includes a discussion of the offense (including the prisoner's version), a personal history, general background, and information on his educational and occupational development, social history, environment, and military career. This entire report is substantiated by FBI files, school and military records, etc., before being put in final form. The report also includes a personal evaluation of the prisoner, including recommedations for planning his prison career. This last step is a subjective evaluation designed to enable the commandant and confinement officer better to rehabilitate the individual and to place him in a job which will give him the most satisfaction commensurate, of course, with his custody clearance.

All prisoners are tested with the Multiphasic Personality Inventory Test, a sentence completion test, and a picture drawing test. The first consists of 550 questions on the individual's environment — family, personal, ethical, and physical. The second test calls for the prisoner to fill in a blank space, which will give sense and meaning to the question. This gives valuable clues to the examiner about the person and his mental atmosphere. The picture-drawing test is often the most revealing of the three. In it, the prisoner is asked to draw the picture of a person of either sex, after which he is asked to draw a person of the opposite sex. The size and intricacy of the drawing, the position of the drawing on the paper, development of the figure and many other points of evaluation aid the expert in his analysis of the prisoner. After the initial tests, the psychologist will evaluate each of the prisoners and select those who show a need for further testing. To this special class of prisoners, he will administer a Thematic Aperception Test and the Rohrschach Test. The Thematic Aperception Test is merely a drawing of a situation, a dramatic scene, and the prisoner is asked to describe what is happening in his own words. Nothing in particular is suggested by the scene; the story described is the prisoner's own and may be very revealing

concerning his inner thought processes and mental attitude. The Rohrschach Ink Blot Test is perhaps the most enlightening of all the examinations. The prisoner is shown 10 cards which contain ink blots of different sizes, shapes, and colors, and is asked to give his impression of the blot as it appears. This test must be conducted by an expert, or it is valueless. However, in the hands of such a person, every movement, every suggestion or reaction by the prisoner may be pertinent, meaningful, and revealing. The patients are all, of course, given intelligence or IQ tests, i.e., the Wechsler-Bellevue Intelligence Scale, and aptitude tests to aid the planning of his future prison career. This also is an aid in preparing the psychiatrist for his examination of the prisoner.

There is a routine psychiatric examination given to all prisoners in which the doctor tries to get the man to express himself, to speak of his offense, or to discuss anything else which may be on his mind. Thereafter, an initial interview report is prepared, noting those prisoners who need further help. Later, these may receive group or individual therapy, or perhaps even both. The Psychiatric and Neurology Section includes two officer psychologists, plus a staff of 12 to 14 enlisted interviewers, testers, and case workers, most of whom are college graduates. Finally, a complete physical examination is given the prisoner by the Medical Officer and his staff.

The results of these various interviews and tests are forwarded to the Classification Division, where this information, together with that received from the Prisoner Personnel Division, is compiled into a Classification Summary. This summary is used by the members of the Institutional and Clemency Classification Boards for their guidance in determining custody, quarters, employment, education and vocational training psychotherapy, and other programs, as well as for making recommendations with regard to restoration, clemency, and parole.

11. PROGRAMMING

A. *Institutional Programming*

Pertinent regulations[10] dictate that within 30 days and in no case later than 45 days following his arrival at the disciplinary barracks the prisoner will be individually considered and an institution program established for him concerning the nature of his custody while in confinement, including the degree of supervision required because of conduct or known characteristics

[10] Par. 13, SR 210-185-1, 31 May 1951, as amended.

of the individual; work assignments to shops, schools, vocational, an general assignment work; and special programming deemed appropriate. The Institutional Classification Board (to be distinguished from the Institutional Clemency Classification Board, discussed *infra)* is the medium through which the prisoner's institutional program is effected.

B. *Custody*

It is the disciplinary barracks' policy to impose on a prisoner the minimum amount of restraint necessary to insure continued control over him. In determining the degree of custory, no single factor such as type of offense or length of sentence is utilized. **A** combination of all known circumstances of the prisoner's case, plus observation made of him is determinative. When a prisoner leaves the Reception Barracks, he is initially housed in the most secure facility available and is permitted to move about inside the enclosure only in the company of an unarmed guard. This prisoner is also assigned to duties inside the enclosure. If the prisoner's conduct remains good and he earns good work reports, he will move through the various degrees of custody until he attains a minimum custody status. Each change in custody **is** authorized by the Commandant in approving the recommendations of the Institutional Classification Board. There are three Custody Grades:[11]

(1) Maximum Custody — Usually reserved for those individual prisoners with long sentences, who have committed serious offenses, or who have many previous convictions. It is initially utilized in order to enable the individual to establish, as a matter of record, either his good intentions or his unwillingness to adjust.

(2) Medium Custody — Reserved for those prisoners considered to require continuous supervision, but who are not believed to posses scharacteristics of a dangerous, violent, or trouble-making nature, requiring special custodial controls. **A** medium custody prisoner is allowed to go from place to place within the enclosure under normal supervision (by means of an individually controlled pass system).

(3) Minimum Custody — Reserved for those prisoners considered to be sufficiently stable, dependable and trustworthy to require little or no custodial supervision.

[11] *Ibid.*

Minimum custody prisoners may be further divided into Minimum "A" and Minimum "B." The former may be assigned to live in less secure housing units within or without the enclosure; they may also move about (within limits) and perform assigned duties without guards or immediate supervision. The Minimum "B" custody prisoners are not quartered outside the enclosure, and, when detailed to work outside the enclosure, must be under the supervision of overseers or unarmed guards at all times.

C. *Educational Program*

The educational program at a disciplinary barracks is considered of utmost importance to the success of the rehabilitation program. Regulations[12] provide that all illiterate prisoners must attend classes in elementary subjects until they have attained an education of at least the fourth grade level under criteria established by the United States Armed Forces Institute. All prisoners are urged to improve their educational level while in confinement. To assist them in accomplishing this, the educational program embodies academic courses on levels up to and including two years of college. Enrollment in academic courses is on a voluntary basis, and class schedules are arranged for both day and evening sessions so that they will not conflict with work schedules or other essential functions. Instructors are qualified military and civilian personnel or, when available, qualified prisoners. Correspondence courses from an approved list are also made available.

According to statistics released by the Armed Forces,[13] approximately 38 percent of Army prisoners in disciplinary barracks have an eighth grade education or less; 45 percent have less than a high school education; 15 percent have completed high school; and approximately 2 percent have completed one or more years of college.

D. *Vocational Program*

A carefully planned vocational program operating in conjunction with the academic school materially assists in the readjustment and rehabilitation of the prisoner. The Vocational Training Program at the disciplinary baracks encompasses some 20 indus-

[12] *Id.* par. 53.

[13] Semi-Annual Statistical Report, 1 Jan–30 Jun 1958. Army and Air Force Prisoners, Department of the Army, Office of The Provost Marshal General.

trial trades, including auto mechanics, machine shop work, carpentry, plumbing, woodworking, upholstering, furniture manufacturing and finishing, garment work, and office machine repair. Vocational training on the farm includes both general farming and specialization in cattle, swine, poultry, truck crops, and greenhouse operation. Products produced in the vocational shop are sold through the disciplinary barracks vocational sales store to eligible purchasers and are not sold in the open market. The Federal Prison Industries also operate units at certain of the disciplinary barracks. Their production, of course, is a part of the armed forces procurement program.

Every effort is made, consistent with the operating requirements of the disciplinary barracks, to assign or reassign prisoners to vocational programs in keeping with their capabilities and interest, and which will contribute toward their rehabilitation and adequate employment upon return to civilian life. Extra good time abatement[14] and industrial wages are authorized to encourage prisoners to earn assignments to industrial and key service employment and to render their best service on such assignments. In making assignments to the Federal Prison Industries where industrial wages are authorized, full consideration is given to those prisoners with dependents in need of financial assistance. Wages are computed on a piece-rate basis, depending upon the skill involved. In this respect, it is possible for a skilled craftsman to earn as much as **$70** a month. However, the average earned is **$30** to **$40** per month. Extra good time abatement may be earned as follows:[15]

(1) Semi-skilled workers at the rate of two days for each calendar month of employment.

(2) Skilled workers at the rate of three days for each calendar month during the first year of employment, four days for each calendar month during the second, third, and fourth years of such employment, and five days for each month during the fifth and succeeding years of employment.

In the case of those prisoners for whom formal vocational training is not considered appropriate or practical, every effort is made to assign such prisoners to details which will provide

[14] To be eligible, a prisoner must be serving a sentence for a definite term of years of confinement other than for life.

[15] AR 210–185, 21 May 1951; par. 60, SR 210-185-1, 31 May 1951, as amended.

them the maximum benefits from a rehabilitative viewpoint, keeping in mind both their adjustment to confinement and their needs upon release. Those prisoners not considered suitable for vocational training because of lack of aptitude, low educational or intelligence level, lack of interest, or insufficient time remaining for the attainment of minimum vocational training goals, and for whom other specific job assignments are not considered appropriate, are classified "general assignment." Specific detail assignments for all prisoners so classified are made by the Disciplinary Barracks Employment Officer in accordance with the institution's work requirements.

A 40-hour work week is normal for the employment of prisoners and is the minimum acceptable. This does not mean, however, that the workload of prisoners assigned to duties necessary in the maintenance, operations, and administration of the disciplinary barracks is always so limited.

111. THE INSTITUTIONAL CLEMENCY CLASSIFICATION BOARD

Separate and distinct from any clemency action accomplished by means of appellate procedures incident to trial by court-martial, every prisoner, adjudged or sentenced, incarcerated in a disciplinary barracks will appear before an Institutional Clemency Classification Board in accordance with prescribed regulations and schedules,[16] as follows:

(1) In cases in which the sentence to confinement is less than eight months, as soon as practicable.
(2) In cases in which the sentence to confinement is eight months or more and less than two years, not earlier than four months nor later than six months from the date the sentence to confinement became effective and annually thereafter.
(3) In cases in which the sentence to confinement is two years or more, not earlier than six months nor later than eight months from the date the sentence to confinement became effective and annually thereafter.
(4) In any case at any time prior to completion of the sentence, upon recommendation for cause.

As previously stated, by the time the individual prisoner is scheduled for an appearance before the Institutional Clemency

[16] Par. 5, AR 633–10, 28 Oct 1959.

Classification Board, a comprehensive file has been amassed. Prior to the prisoner's actual appearance before the Board, his file, including the psychiatric and psychological evaluation provided by the Psychiatry and Neurology Section, is made available to board members, and an individual member will have been assigned the duty of preparing and presenting the case to the Board. The prisoner is not permitted to have counsel.[17]

The Clemency Classification Board is appointed pursuant to pertinent regulations[18] and is composed of at least five members, to include representatives from the Classification Section, the Supervisor of Prisoners' Section, the Psychiatry and Neurology Section, the Education and Training Section, and such other section of the disciplinary barracks as may be determined by the Commandant. The Parole Officer or a representative from the Parole Section will serve as a board member in all cases in which a prisoner is being considered for parole. The Board is convened at the direction of the Commandant, the frequency being determined by the institution workload.

The officer assigned the duty of preparing and presenting the prisoner's case is responsible for reading carefully the contents of the classification summary previously compiled by the Classification Section.[20] Each member of the Board will also have a copy of such summary available for reference at the time the prisoner appears before the Board. In addition, the presenting officer is required to examine the individual's file for vital information which may have been received subsequent to the preparation of the summary.

In preparing his brief of the case for presentation to the Board, the presenting officer will include the following data from the staff judge advocate's review:

(1) Details of the offense.

(2) Maximum sentence which could have been imposed for the offense.

(3) Whether the current sentence, if it is less than the maximum which could have been imposed, is the result of a pretrial agreement between the accused and the United States.

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[17] **Par. 8b, AR 633–20, 19 Jun 1956.**

[18] **Par. 12, AR 210–185, 21 May 1951.**

[19] **Par. 10, SR 210–185–1, 31 May 1951, as amended.**

[20] **Id. par. 18.**

(4) Impressions of the staff judge advocate with regard to the prisoner's rehabilitation potential.

(5) Any other information which is deemed of importance to the Board.

As the fate of the prisoner in so far as clemency, restoration, parole, or transfer to a Federal penal or correctional institution depends to a great degree upon the thoroughness with which the member prepares and presents the case to the Board, the importance of the staff judge advocate's review cannot be overemphasized. After the case is presented orally to the Board, recommendations of the members are held in abeyance, pending interview of the prisoner.

After the prisoner has reported to the Board, he is put completely at ease and in no way embarrassed by needless questioning concerning his offense or past military or civil criminal record, the details of which are contained in the presenting officer's brief and the classification summary. The prisoner is not made to feel that he is facing a judge or jury or that his fate is in the hands of the Board. The Board-avoids any indication of haste, impatience, or other action that would lead the prisoner to believe that the proceedings are perfunctory or that the decision to be rendered in his case was determined before his appearance. The time of the board members is normally not taken up in discussing the merits of clemency, parole, or restoration, as the prisoner has been thoroughly oriented concerning all aspects thereof prior to his appearance. However, in the event the prisoner has a specific question in mind concerning these subjects, it is the duty of the board members to answer it, and the prisoner is afforded full opportunity to express himself concerning his desire for clemency, parole, and restoration. While each prisoner appearing before the Board is automatically considered for clemency (reduction in sentence of change in type of discharge),[21] and parole,[22] he is not considered by the Board for restoration

[21] Par. 5, AR 633–10, 28 Oct 1959.

[22] AR 633-20, 19 Jun 1956. To be eligible for consideration, the prisoner must be confined pursuant to a sentence or aggregate sentence of one year or more in a disciplinary barracks and must have served one-third of the total of his term of confinement, but in no case less than six months, or have served 10 years of a term of life, or of a term or aggregate terms of more than 30 years.

to duty unless he expressly requests to be so considered.[23] In that event, he is required to file an application in which he agrees, if restored to duty, to serve on duty for a period equal to the unserved portion of his enlistement or at least one year (whichever is the longer) following his release from confinement.

The members of the Board constantly bear in mind that each prisoner appearing before them is an individual—a fellow human being who is soon destined to leave confinement, whether it be through restoration, parole, or release at the expiration of his sentence. It is the responsibility of the Board to determine the optimum manner and time for such release. At the conclusion of the interview, the prisoner is not informed of the Board's recommendation but is told that the Board's recommendations in his case will be submitted to the Commandant for review and thereafter forwarded to the Office of The Provost Marshal General, Department of Army, Washington, D.C., for further review, processing and ultimate submission to the Secretary of the Army. He will be informed of the Secretary's decision when it is received, normally, within two to four months.

The Board, in arriving at its recommendations, considers the offender and the effect its recommendation will have upon society and the armed forces. Of course, it considers the offense or offenses of which the prisoner has been convicted. It recognizes that it is not dealing with an innocent man who has committed an offense and has been subjected to punishment. The Board also recognizes that punishment is a vital factor in maintaining discipline, as a deterrent to others, and as a means to correct the individual offender.

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[23] Par. 5*a*, AR **600–332, 24** May **1951,** specifies that the prisoner will be considered for restoration in all cases prior to release from confinement and at such other times as the prisoner is considered for clemency. However, by letter, AGPK–CS(M) **253.12 (2** Jun **1954)** GI, Department of the Army, **16** Jun **1954,** subject: "Applications for Restoration to Duty," it is specified that the individual desiring restoration must submit a prescribed written application. The prescribed application form is designed to determine the prisoner's attitude toward restoration at the disciplinary barracks before Department of the Army has taken action to approve or disapprove. It is also designed to enable the Department of the Army to determine whether to waive the voluntary extension requirement and/or to determine whether he will be required to enlist for one of the periods authorized by AR **601–210, 12** Apr **1956.** The determination of the Department is transmitted to the disciplinary barracks in the form of an approval letter. The prisoner can, at that time, elect whether to accept or reject restoration. Par. 5*b*, AR 600–**332,** *supra,* states: "Normally a prisoner will not be restored to duty until he has been confined **6** months or has served one-third of his sentence, whichever is the lesser."

A. *Reduction In Confinement*

In arriving at its recommendations, the Board first examines the sentence to see how a reduction in confinement or a change in the form of discharge would affect the services. After such consideration, it appraises the man and his future. In arriving at its conclusions, the Board evaluates the prisoner's entire civilian, military, and confinement records, substantiated, when available, by collateral data. In cases where a reduction in the period of confinement is recommended because of family hardship, the Board's recommendation includes, whenever practicable, verification of the extent of contribution by the prisoner to his family prior to entrance into the service, and during absence (if any) from the service. Its recommendation would further indicate whether the family condition was aggravated by the prisoner himself since entrance into the service or whether the present hardship has been created by circumstances surrounding the family itself.

B. *Parole*

The Board next considers the individual for parole. The Department of Army, in AR **633–20,** 19 June 1956, has defined parole as:

> "a form of conditional release from confinement granted to a carefully selected military prisoner who has served a portion of his sentence to confinement and whose release under supervision is considered to be in the best interests of the prisoner, the military service concerned, and society."

Generally, a prisoner, to be eligible for parole, must be confined in a disciplinary barracks pursuant to a sentence or aggregate of sentences of one year or more and must have served one-third of the total of his term or aggregate terms of confinement, but in no case less than six months, or be one who has served 10 years of a term of life, or a term or aggregate terms of more than **30** years. There are certain exceptions to this rule, the most common being :

(1) A prisoner whose parole has been revoked previously will not normally be eligible for further parole consideration until he has completed one year in confinement subsequent to his return to the disciplinary barracks.

(2) A prisoner who has any indictment or detainer pending against him in any Federal or state court ordinarily will not be paroled.

A prisoner released on parole remains under the legal custody of the Commandant of the disciplinary barracks and under the supervision of a United States Probation Officer until his maximum release date. Parole is not clemency. It has none of the elements of clemency. It is not awarded for good conduct while in confinement. It has no connection with forgiveness. Parole is based upon the principle that training and treatment in the disciplinary barracks are only a part of the correctional process and that they should be followed by a period of guidance and supervision in a normal community. The conditions and terms of parole are reasonable and constructive. With the exception of submitting monthly reports to the United States Probation Officer, not changing his residence or employment without permission, and staying within a specified geographical area, little more is expected of a parolee than is expected of any lawabiding citizen, i.e., not associate with persons of bad or questionable reputation, work diligently at a lawful occupation, and support those dependent on him.

C. *Restoration To Duty*

Prior to *United States* v. *May*, 10 USCMA *258*, **27** CMR **432** (1959) approximately 60 percent of the prisoners admitted to the disciplinary barracks had their punitive discharge "suspended until the accused's release from confinement or until completion of appellate review, whichever is the later date." In such a case, and when the appellate review had been completed and the prisoner had not been selected for restoration, the necessary administrative action was taken to effect the punitive discharge at the time the prisoner was released from confinement. There was no requirement that further court-martial orders be promulgated and no hearing under the provisions of Article **72** was held. As a result of the *May* decision some **397** prisoners in the disciplinary barracks immediately became "true probationers" with entitlement to be returned to an honorable duty status upon completion of their confinement. No special program was adopted at the disciplinary barracks whereby the return to duty of these individuals would be accelerated. These individuals continued to be processed and evaluated in the same manner as prisoners with executed discharges. Of course, the fact that the prisoner will be eventually returned to duty without clemency action is a strong factor in his favor. In the event he is recommended and approved for an early restoration to duty he is processed in the same manner as

is a prisoner with an executed discharge. That is, he is required to extend the unserved portion of his enlistment and is required to complete the course of training given in the Retraining Company before being restored to duty. **A** few prisoners when offered the opportunity for such an early return to duty, refuse and elect to complete the approved period of confinement and be returned to duty with the obligation of completing the period of enlistment plus making up the lost "bad time." In such event, they are nevertheless transferred to the Retraining Company and required to take that course of training during the eight week period prior to the expiration date of their sentence.

Subsequent to the *May* decision a very small percentage (unofficially reported to be less than 2%) of the prisoners admitted to the disciplinary barracks have had their discharges suspended by convening authorities. Consequently, the selection of prisoners for restoration to duty is now one of the principal functions of the Institutional Clemency Classification Board.

In considering a prisoner for restoration to an honorable duty status, the Board must adhere to the policy criteria outlined in **AR** 600–332, **24** May 1951. These regulations outline the conditions under which suitability for restoration to duty is determined and the procedure by which restoration will be accomplished. Paragraph 1*c* states:

> "A prisoner's entire civil, military, and confinement record will be considered in determining his suitability for restoration to duty. Desertion or absence without leave to avoid embarkation for oversea duty, desertion from units engaged in combat (unless the offender was a victim of combat exhaustion following substantial combat service), a history of excessive drunkenness, repeated absence without leave, or continued difficulty in adjusting to military life will ordinarily disqualify for restoration to duty. In the absence of exceptional circumstances, conviction of a crime involving moral turpitude and generally recognized as a felony in the civil courts will also preclude restoration to duty. These 'exceptional circumstances' will include such factors as youth, a comparatively low degree of moral turpitude or wrongful intent in the commission of the offense, a substantially clear civil and military record, with a reputation for honesty and good behavior, and demonstrated ability to perform military duties in a creditable manner. Such cases will be determined on individual merit, with due consideration of the effect which such restoration will have upon the esprit and good name of the Army."

Among the basic factors favoring restoration are: youth at the time of the offense; first offender; possesses skills needed by the service; strong motivation; favorable prior service record; favorable evaluation by former company commander or the staff

judge advocate; stable personality; profited by confinement experience; nature of offense; circumstances surrounding the commission of the offense; psychiatric recommendations. Among the basic factors militating against restoration are: serious juvenile problem; civil criminal record; present offense follows a pattern; poor previous service adjustment; disturbed family situation which seems likely to affect service adjustment; lacking in aptitudes and skills needed by the service; not motivated for restoration; serious nature of offense; failure to meet current physical and intellectual standards; psychiatric indication of personality disorder, alcoholism, drug addiction; sexual deviation, mental defectiveness, etc.; poor response to the institution program; or effect upon the military service and community.

It is the intent of the Department of Army to insure that each prisoner whose restoration to duty is approved will be required to serve at least one year subsequent to the date of his restoration. Thus, the restoree must extend for **a** period of three, six, nine, or eleven months (under current regulations) in order to complete the required one year service. If, by an eleven month extension, the restoree cannot fulfil the one year requirement, he *may* be authorized to begin a new enlistment or the extension requirement may be waived by the Department of the Army. However, extension plus the term of enlistment already served cannot exceed six years.[24] If extension to provide one year of service following restoration exceeds the six-year limitation, the prisoner may be restored to serve out the unexpired portion of enlistment upon his executing a "Statement of Intent" to re-enlist upon completion of the existing enlistment. The above may be summarized as follows:

> "Prisoners having suspended punitive discharges [selected for restoration prior to completion of this period of confinement] and less than one year to serve on their last service obligation, must serve the voluntary extension in addition to the unserved portion of the existing service obligation. If the prior service obligation is close to one year, the Department of the Army may waive the voluntary extension requirement, and such waiver when granted will be noted in the Department of the Army approval letters.
>
> '[Prisoners with ***executed*** punitive discharges will be restored to duty in the Regular Army for a period equal to the unserved portion of their prior service obligation, *provided* this period is for one year or more. If the prisoner has more than one year remaining on the unserved portion of his prior service obligation, he will be required to enlist in the Regular Army for one of the periods authorized by AR 615–210. Present

[24] Par. 12, AR 601–210, **27** Apr 1959.

statutes do not provide for enlistments for a period of one year. In each instance, Department of the Army letters announcing approval or restoration to duty will specify whether the prisoner will be required to enlist for one of the periods authorized."[25]

Realizing the soundness of the basic concept of one year's service after restoration, the inflexible statutes nevertheless result in an inequitable distribution of service among restorees. For instance, a prisoner with an executed discharge and having less than one year remaining to serve on his current enlistment will refuse to apply for restoration because it would require him to enlist for a minimum three-year term while many of his contemporaries are required to serve for one year only.

D. *Transfer To Federal Institutions*

The Institutional Clemency Classification Board, in determining whether to recommend the transfer of an individual to a Federal penal or correctional institution or to retain him at the disciplinary barracks, is guided by the criteria set forth in pertinent regulations[26] and a Department of Army policy letter, dated 12 December 1956.[27] In the latter, it is stated:

"In general, prisoners who appear to be restorable to military duty, youthful prisoners, and prisoners who have committed military type offenses or minor civil offenses, will be retained in disciplinary barracks. The objective in transferring prisoners from disciplinary barracks to Federal penal and correctional institutions is to provide for the separation of those prisoners who, by reason of offenses or background, evidence traits of criminality or ther characteristics which render inadvisable their association with minor, youthful, non-criminal offenders; and, other types of offenders who appropriately may be rehabilitated through confinement in a disciplinary barracks."

Inclosed with the quoted letter was a copy of the specific factors which were to be considered in selecting prisoners for transfer. This inclosure stated:

"FACTORS TO BE CONSIDERED WHEN SELECTING PRISONERS FOR TRANSFER TO FEDERAL INSTITUTIONS

"1. A priosner normally will be selected for transfer is one of the following conidtions exist:

"1st Ind from Office of The Adjutant General (AGPK–CS 253.12) dated 3 Aug 1954, addressed to the Commandant, U.S. Army Rehabilitation Training Center, Camp Gordon, Georgia.

[26] Par. 4a(1) and (2), AR 633–5, 24 Sep 1957.

[27] Letter from Office of The Provost Marshal General (PMGK–ST 253.91) addressed to Commandants of all disciplinary barracks, subject: "Transfer of Prisoners From Disciplinary Barracks to Federal Institutions."

a. He has been convicted of and is serving sentence for one of the following offenses:

(1) Arson, kidnapping, murder, pandering, rape, sodomy, trafficking in narcotics, or treason, or

(2) Assault with a dangerous weapon, attempted murder, attempted rape, burglary, mutiny, and robbery, if the offense was aggravated by reason of the prisoner' conduct.

b. His background reveals a pattern of delinquency or criminal tendency, indicating that his continued association with youthful and non-criminal type offenders would be inadvisable.

c. It appears that his continued confinement in a disciplinary barracks will have an extremely adverse effect on the rehabilitation of other prisoners.

"2. Unless one of the factors indicated in paragraph 1 exists, a prisoner normally will not be selected for transfer if one of the following conditions exists:

a. He is under 22 years of age.

b. He is serving a sentence for the commission of a military type of offense or a minor civil offense.

c. He has no prior civil record of confinement in an adult penal or adult correctional institution.

d. It appears that continued confinement in a disciplinary barracks would be more beneficial to a prisoner because of some special training or guidance he is receiving, or because of some other compelling circumstance.

"3. A prisoner normally will not be selected for transfer to a Federal penal or correctional institution if:

a. His sentence has not been finally approved, or if

b. He appears to be restorable to military duty, or if

c. His case is scheduled for restoration, clemency, or parole consideration prior to his next annual review date.

"4. A prisoner will not be selected for transfer under the above criteria if such transfer is otherwise prohibited by law, regulation, or other directives."

The classification summary and the Board's recommendations (with the number of votes for and against recorded) are forwarded to the Commandant of the disciplinary barracks for his action. The Commandant, after consulting his staff judge advocate and his director of classification, indicates his approval or disapproval. Thereafter, the entire classification summary, including the Board's recommendations and the Commandant's action, is forwarded to the Office of The Provost Marshal General, Department of Army.[28] The Corrections Division in the Office of

"Effective 22 Aug 1954, reports and material dealing with correctional activities were transferred from The Adjutant General to The Provost Marshal General pursuant to Department of the Army letter AGPZ(M) 310.1 (10 Aug 1954), Office of The Adjutant General, dated 10 Aug 1954, subject: "Announcement of Transfer of Staff Functions."

The Provost Marshal General is responsible for maintaining records of each prisoner, for the review and analysis of their cases with respect to consideration for restoration, clemency, and parole, and for presenting the facts in each case.[29]

When classification material forwarded by the disciplinary barracks reaches the Corrections Division, the file and all available material maintained in the Division are assembled and forwarded to a case analyst. Following analysis, the case analyst sets forth his own conclusion and prepares a brief of the case for presentation to the Restoration Board in the Office of the Chief of Corrections Division. This Board is composed of a minimum of three officers. The prisoner is not entitled to counsel before this Board. The Board's recommendations are acted upon by The Provost Marshal General, who has the delegated power to disapprove all cases in the name of the Secretary of the Army, as well as the authority to approve restoration of offenders to duty in those cases involving military offenses.[30] Felony cases, if approved by The Provost Marshal General, are submitted for final approval to the Office of the Secretary of the Army.

Those cases which The Provost Marshal General does not approve for restoration are presented to the Army and Air Force Clemency and Parole Board for consideration with regard to clemency and parole,[31] as may be appropriate. Cases are presented by qualified case analysts employed in the Corrections Division and are accompanied by the recommendations of The Provost Marshal General and the recommendations of the disciplinary barracks Classification Board and the Commandant. The action of the Army and Air Force Clemency and Parole Board in each case is forwarded to the Office of the Secretary of the Army for approval in Army cases and to the Office of the Secretary of the Air Force, for approval in Air Force cases.

The Army and Air Force Clemency and Parole Board operates in the Office of the Secretary of the Army and consists of three members. The chairman of the board is a civilian, a man of long and successful extensive experience in penal administration, parole of prisoners, and related problems ; the other two members

[29] Par. 4*d*, AR 15–130, 23 May 1951.

[30] Delegated to The Provost Marshal General per memorandum from the Assistant Secretary of the Army, Mr. Hugh M. Milton, 11, dated 9 Aug 1954, with the proviso that cases involving offenses of a civil nature (felonies) and officer cases would continue to be forwarded to the Secretary's Office.

[31] Par. 4*f*, AR 15–130, 23 May 1951.

are Department of the Army and Air Force field grade officers, at least one of whom must be a judge advocate. Personal appearances by or on behalf of the prisoner are not permitted.[32]

The Board makes clemency recommendations to the Secretary of the Army with regard to Department of Army personnel and to the Secretary of the Air Force with regard to Department of the Air Force personnel. These recommendations may include the substitution, for good cause, of an administrative form of discharge for a punitive discharge for those persons confined in disciplinary barracks. Clemency jurisdiction with respect to remission of sentence and change of form of discharge for those military prisoners in confinement in Federal institutions remains with the Departments of Army and Air Force. Parole of individuals incarcerated in a Federal institution is a matter for the United States Board of Parole.

The Board is also charged with developing and recommending uniform policies with respect to clemency and parole matters, such policies to become effective when approved by the Secretaries of the Army and Air Force.

The objectives and policies of the joint program of the Army and Air Force Clemency and Parole Board are exceedingly important to defense counsel and other judge advocates engaged in the administration of military justice. These objectives and policies, as extracted from **AR** 15–130, **23** May 1951, are:

> **"3.** Objectives and policies.—a. The general objectives of the joint program are to—
>
> **(1)** Maintain uniform policies with regard to punishment and treatment of the prisoner personnel of the respective Departments.
>
> **(2)** Obtain uniformity in sentences for similar offenses and offenders.
>
> **(3)** Reduce sentences to the minimum consistent with maintaining current and future discipline in the services and the best interests of society and the prisoner.
>
> **(4)** Release from confinement, under supervision, to complete the service of their sentences in the free community, selected prisoners who have served a portion of their sentences in confinement and whose parole will be in the best interests of society, the services, and the prisoner.
>
> **(5)** Maintain uniform policies with regard to parole of the prisoner personnel of the respective services.
>
> b. The following general policies govern clemency:
>
> **(1)** Each case will be considered individually on its merits, with due weight given to factors such as nature and seriousness of offense;

[32] *Id.* par. *4q.*

character, kind, and length of military service; mental and physical condition; age; conduct in confinement; dependents; and civilian record.

(2) Civil court standards of punishment generally will be used as a guide in determining appropriate sentences for offenses commonly recognized as crimes by civil courts.

(3) In the event a prisoner is not eligible for restoration to duty for service because of some mental or physical disability, and his civil and military record is such that but for such disability, it appears reasonably certain that he would have been returned to duty with an opportunity to earn an honorable discharge, provision may be made in unusual cases, where clearly equitable, to substitute an administrative form of discharge or dismissal executed in accordance with sentence of the courtmartial. Similar action also may be taken where it convincingly appears after trial that, at the time of the commission of his offense, a prisoner was not mentally responsible for his acts under accepted legal standards.

(4) Where the offense or circumstances surrounding it and the prisoner's military record generally are such as to clearly indicate that a dishonorable or bad conduct discharge constitutes excessive punishment, an administrative form of discharge may be granted. . . .

The board first examines the sentence to see what effect a reduction in sentence or change in form of discharge would have on the services. After this is evaluated, it gives consideration to the rehabilitation of the man and his future. It is not always possible **or** feasible for the board to follow the recommendations received from disciplinary barracks. They are, however, given the greatest weight and are followed in every instance possible if such action can be taken without violating existing Department of the Army **or** Department of the Air Force policy.

Prior to 1959, while an adjudged prisoner's case was undergoing appellate review, favorable board action regarding a reduction in confinement or parole rarely resulted. The theory apparently was that, until an accused became a sentenced prisoner, it was wise to avoid confusion "by leaving action on sentence solely in the hands of those who would rule on the appeal."[33] In those rare instances where the board did act favorably, it did so through the means of transferring the adjudged Army prisoner from a disciplinary barracks to the Retraining Command at Fort Leavenworth, Kansas. In many instances, the prisoner, knowing that he could not hope for parole prior to completion of the appellate review, chose to forego his statutory right to petition to the Court of Military Appeals in an effort to expedite his release on parole. During 1958, the Judges of the Court of Military Appeals ex-

= Everett, *Military Justice in the Armed Forces of the United States, 258* **269 (1956)**

pressed concern over the number of prisoners requesting withdrawal of their petitions for a grant of review. As a result, The Secretary of the Army approved a plan whereby adjudged prisoners could be paroled from disciplinary barracks, if otherwise meeting the criteria for parole, in a status known as "Commandant's Parole."[34] However, during 1959 only one prisoner was approved for this type of parole.

While parole or a reduction in the period of confinement rarely results in the case of an adjudged prisoner, restoration to duty does occasionally occur. In such event, the prisoner is processed and transferred (in an unsentenced status) to the Retraining Command at Fort Leavenworth, Kansas.[35]

The decisions of the Restoration Board and of the Army-Air Force Clemency and Parole Board are processed in the Office of The Provost Marshal General and dispatched to the disciplinary barracks. The decisions, known by prisoners as "Washington Approvals," may be expected to be received at the disciplinary barracks within 60 to 120 days from the date the prisoner appeared before the Institutional Clemency Classification Board.

Following the initial consideration, each prisoner's case is thereafter reconsidered annually by the Departments of Army and Air Force. Accordingly, each case is scheduled for consideration by the Institutional Clemency Classification Board at the disciplinary barracks at such time as will allow their recommendations to arrive in the Office of The Provost Marshal 30 days in advance of the established "Annual date." In addition to normal reconsideration, special consideration may be directed by the Secretary of the Army, or may be authorized by the Commandant upon recommendation of the clemency classification board, or for good cause shown. Prisoners may forward requests to the Commandant asking that they be granted a "Special" board. Boards under these circumstances are not granted except in those instances wherein new information is submitted that materially affects the prisoner or some important change has taken place that indicates reconsideration is in the best interests of the military service, society, and the prisoner concerned. In this regard, trial defense counsel may materially assist their "clients" by forwarding to the disciplinary barracks, for inclusion in the pris-

[34] Interim instructional letters have been furnished the Commandants of the disciplinary barracks (Ltr DA OPMG(PMGK-S 253.2) dated 11 Feb 1959).

[35] See note 13, *supra*.

oner's file, letters of character references, commendations, etc. In addition, duplicate copies should also be forwarded to the Corrections Division, Office of The Provost Marshal General, Department of the Army, in order that they will be directly available to the case analyst and may be presented to the Restoration Board as well as the Army-Air Force Clemency and Parole Board. Documents and character evidence introduced at the court-martial are not, as a matter of routine, available to the Institutional Clemency Classification Boards, the Restoration Board, or the Army-Air Force Clemency and Parole Board.

Following receipt at the disciplinary barracks of the decision of the Restoration Board and the Army-Air Force Clemency and Parole Board, the prisoner is officially informed of the result.

IV. APPELLATE REVIEW OF COURT-MARTIAL RECORDS

As stated in the first paragraph of this article, the record of trial of the prisoner is transmitted directly to The Judge Advocate General while the prisoner is being transferred to the designated disciplinary barracks.

Simultaneously with the processing of the prisoner at the disciplinary barracks, the preparation of the classification summary, and the disposition of the prisoner's case regarding restoration to duty, clemency, and parole at the Departmental level, the prisoner's record of trial is being legally reviewed under provisions of the Uniform Code of Military Justice.

In order that a complete picture may be presented, it is believed appropriate briefly to review the action taken in completing the appellate review of the prisoner's case. Each punitive discharge case receives a mandatory review by a board of review in the Office of The Judge Advocate General. The accused is entitled to be represented before the board of review by appointed appellate military defense counsel on request, or he may retain individual civilian counsel at his own expense. The Judge Advocate General has recently held that when an accused has retained individual counsel of his own choice, the accused is not entitled, as a matter of law, to appointed military appellate defense counsel.[36] This is not to imply that the services of military counsel will be denied to an accused who has retained individual counsel. It does mean that, in the event the accused retains individual counsel, the services of military appellate defense counsel will be proffered but in

[36] JAGJ 1958/6470, 24 Nov 1958.

the event the individual counsel retained by the accused conducts the appellate representation of the accused in such a way that the military appellate defense counsel cannot conscientiously participate in the case or make demands upon the military counsel which are inconsistent with the Canons of Ethics or the ordinary decent relationships between lawyers, the military appellate defense counsel may thereafter, with permission of the appropriate board of review and upon a showing of good cause, withdraw from the case.

Under the Code, the board of review has extensive powers. It has the authority to consider the legal matters involved in the trial and to correct any errors by dismissing the charges or ordering a retrial. Further, in determining the legal sufficiency of a case, a board of review has the power to weigh the evidence, judge the credibility of the witnesses, bearing in mind, however, that the trial court has heard the witnesses, and has had an opportunity to observe their demeanor. Finally, a board of review has the power to modify sentences, approving only such part of the sentence as they deem appropriate.

Although the board of review has the power to review sentences, it does not have the authority to suspend any part of the sentence. It is encouraged, however, in a proper case, to make a recommendation to The Judge Advocate General for suspension, either of the punitive discharge or the sentence in its entirety. The Judge Advocate General has been delegated authority, at any time prior to completion of appellate review, to mitigate, remit, or suspend, any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.[37]

After the board of review has completed its review of the case, the decision is forwarded to the staff judge advocate at the disciplinary barracks where it is served on the accused. At this time, the prisoner is individually counseled concerning his appellate rights. Such counseling becomes a rather challenging endeavor. Obviously, for a judge advocate properly to prepare a petition for grant of review to the Court of Military Appeals, it is necessary to read the record of trial; to verify the facts related by the accused; and to research the questions believed to merit consideration on appeal. In those instances in which the prisoner has his personal copy of the record of trial, a problem presents itself be-

[37] Par. 2, AR 633–10, 28 Oct 1959.

cause of the lack of sufficient legally trained personnel at the disciplinary barracks to read each record, interview the prisoner concerning the unrecorded phases and the basis for tactics or strategy utilized at the trial. Of more importance is the problem often presented to the staff judge advocate at the disciplinary barracks wherein a prisoner reveals information which results in a conflict of interest between the staff judge advocate's primary duty as legal adviser to the Commandant of the disciplinary barracks and his secondary duty of serving as counsel for the accused in perfecting the accused's petition to the Court of Military Appeals. The vast number of prisoners arriving at the disciplinary barracks without copies of their record of trial also presents a problem, In these cases, the judge advocate has no alternative but to prepare a "Pro Forma" petition, leaving to the Defense Appellate Division in the Office of The Judge Advocate General the duty of reading the record of trial and, if deemed warranted, filing an amended petition to the Court of Military Appeals.

In counseling a prisoner, his age and mental group are factors in the amount of time and effort expended. In a recent survey, the median age of Army prisoners confined in the disciplinary barracks was shown to be about 25 years. Some 27 per cent were 21 and under; 21 per cent were between 21 and 25 years; 26 per cent were between 25 and 29 years; 12 per cent were between 30 and 34; and 13 per cent were 35 and over. Of this group, approximately 38 per cent possessed an eighth grade education or less; 46 per cent possessed less than a twelfth grade education; with some 12 per cent possessing a twelfth grade education. Only 0.2 per cent were college graduates, with approximately 2½ per cent possessing some college training. A comparison of the GI reflects that 49 per cent of the prisoners were placed in the below average group, with 30 per cent falling with the average group.[38]

Any appellate system which must rely upon the prisoner's ability to understand the technical proceedings and upon his ability to carry on an extended correspondence with his appellate defense counsel is inherently unjust. Under the current system, the judge advocate at a disciplinary barracks has no alternative but forward, regardless of the merits, a "Pro Forma" petition when the prisoner expresses a desire to petition. The Chief Judge of the United States Court of Military Appeals early recognized this problem and stated that it is necessary for the Court to deny approximately 85 per cent of the petitions received in the Court

[38] *See* note 13, *supra.*

for want of good cause. To correct this situation, the services have proposed a change in the Code which will provide that the Court of Military Appeals need consider petitions for grant of review only when counsel who represented the accused at trial or before the board of review, or appellate defense counsel appointed by The Judge Advocate General, if the accused was not represented by counsel before the board of review, or civilian counsel retained by the accused, certifies that, in his opinion, a substantial question of law is presented and that the appeal is made in good faith.

If the accused decides not to appeal, he may request the immediate issuance of his final general court-martial order. This action on his part does not prevent him from later changing his mind and filing a petition, but it does permit the publication of the final general court-martial order ordering the sentence into execution, subject to possible revocation.

If the prisoner decides to petition the Court of Military Appeals, the petition is prepared and forwarded to the Office of The Judge Advocate General of the Army where it is referred to the Defense Appellate Division. Here, the record of trial is again reviewed by the appointed appellate defense counsel, and if there are substantial matters of law which appear to need emphasis in the accused's interest, a brief is prepared and forwarded to the Court. If the appellate defense counsel is unable to find substantial errors of law which appear to need correction in the accused's interests, the petition is forwarded by "Cover Sheet" to the Court. If the petition is favorably considered, the case is set down for a hearing at some future date.

Following the decision of the Court of Military Appeals, the opinion is forwarded to the staff judge advocate at the disciplinary barracks for service on the accused and the preparation and promulgation of the supplementary or final general court-martial order ordering the sentence into execution. Currently, approximately one year elapses between the date an accused is tried by court-martial and the date his sentence is finally ordered executed. As a result, many prisoners who have completed their period of confinement cannot be released from the service. Prisoners in this category are returned to duty "pending completion of appellate review.'' Further, as an adjudged prisoner is not subject to the same treatment a5 a sentenced prisoner, the administration of the work details at the disciplinary barracks is unduly complicated.

Upon completion of appellate review, a prisoner's civilian, military, and confinement record is reviewed by the staff judge advocate prior to the promulgation of the general court-martial order ordering the sentence into execution. If the case involves a punitive discharge not previously suspended and it appears that restoration is warranted, either immediately or by the time the sentence to confinement is completed, the punitive discharge may be suspended with a provision for automatic remission. The officer exercising general court-martial jurisdiction over a prisoner confined in a disciplinary barracks does not have the authority to mitigate, remit, or suspend any other portion of the prisoner's sentence. These latter actions may be exercised only by the Secretary of the Army.[39] In actual practice, the officer exercising general court-martial jurisdiction over the prisoners confined in the disciplinary barracks, rarely ever exercises his power to suspend the execution of the discharge. Thus, if the convening authority does not suspend the execution of the discharge, it is practically never suspended thereafter.

In cases in which the convening authority has not initially suspended the execution of the punitive discharge until the accused's release from confinement, and, because of a short appellate review, the supplementary general court-martial order is often promulgated ordering the punitive discharge executed, prior to the accused being afforded sufficient time to demonstrate his worthiness of being restored to duty. This executed discharge creates a problem when the accused is subsequently selected for restoration. This soldier will forever have a punitive discharge on his record. Other soldiers, however, whose appellate review has been more protracted, are afforded a greater period of time to "prove" themselves worthy of restoration. Consequently, if they are fortunate enough to earn a suspended discharge, there will be no mention of punitive discharge on their permanent record.[40]

In addition, a military prisoner whose punitive discharge has not been executed retains certain rights and privileges. He remains a member of the Army, even though his enlistment terminates prior to the final action in his case, i.e., until separation from the service is accomplished by execution of the punitive discharge, or by other means. He may, prior to the convening of the general or special court-martial which will try him for another

[39] Par. 2, AR 633-10, 28 Oct 1969.

[40] Ltr. AGAM-P(M) 210.8 (20 Aug 1956), JAGJ, Department of the Army, 28 Aug 1956, subject: "Suspension of Punitive Discharges."

offense, exercise his right pursuant to Article 25(c), Uniform Code of Military Justice, to request, in writing, that enlisted persons serve on the court. His dependents remain entitled to post exchange privileges under the provisions of AR 60–10, 26 April 1957, as changed; medical care under provisions of AR 40–121, 5 November 1956; and all other normal privileges and benefits afforded other members of the armed forces, including commissary privileges.[41]

V. LENGTH OF TIME A PRISONER SERVES IN CONFINEMENT

Always an item of interest to judge advocates is the length of time a prisoner serves at the disciplinary barracks. This, of course, depends on many factors and each case is individually considered on its merits. However, during the six-month period (January-June 1958) approximately 1500 Army persons were sentenced to a punitive discharge and confinement, Of these, approximately 55 per cent were convicted of military type offenses and 45 per cent of civil type offenses. AWOL represented approximately 29 per cent of the offenses and desertion another 20 per cent. Of the civil type offenses, larceny accounted for the largest number, 22 per cent.

The median sentence for these 1500 persons was **14** months. Sentences of less than two years were adjudged in about 85 per cent of the cases; from two to four years in about 12 per cent of the cases; and of five years in only **3.4** per cent. Approximately **53** per cent of the offenders received dishonorable discharges and 47 per cent received bad conduct discharges.[42]

The earning of good conduct time and employment abatement time along with the restoration, clemency, and parole program materially reduces the amount of time actually required to be served in the disciplinary barracks. But this is not to be construed to mean that a prisoner spends only a few months in confinement and then is restored to duty, as is so often believed. Of some 1526 Army prisoners released from disciplinary barracks and Federal institutions during the January-June 1958 period, 84 were restored to duty, **305** were granted parole, and 1187 were released through expiration or remission of sentence. These prisoners served a median of **11.7** months in confinement, approximately 58

[41] Ltr, AGAM–P(M) 253 (3 Sep 1957), PMGK, Department of the Army, 25 Sep 1957, subject: "Certain Rights and Privileges of Military Prisoners and/or Their Dependents."

[42] See note 13, *supra*.

per cent of their original sentences. Prisoners restored to duty served a median of 9.2 months while paroled prisoners served a median of 15.3 months.[43]

VI. RESTORED TO DUTY

While the mission of the disciplinary barracks as custodian of Army and Air Force prisoners is to promote their reformation and rehabilitation with a view to their honorable restoration to military duty or return to civil life as useful citizens, we must realize that the prisoner has been initially classed as nonrestorable by the staff judge advocate and the convening authority prior to his arrival at the disciplinary barracks. It is therefore surprising that the Restoration Board is able to restore as many as it does.

In FY 1955, 40 prisoners were restored to duty from the disciplinary barracks; in FY 1956, 116; in FY 1957, 202; and in FY 1958, 172. This is approximately five per cent of those prisoners submitting applications for restoration. Therefore, counsel advising accused regarding their chances of earning restoration to duty once they are incarcerated in the disciplinary barracks should not be overly optimistic.

Staff judge advocates in deciding whether to recommend confinement of an accused in a post stockade or in a disciplinary barracks should realize that the rehabilitation program at the disciplinary barracks is primarily designed to create in the individual a healthy outlook on life and teach him a gainful trade in order that he may adjust himself to civilian life. Therefore, if the accused is believed to have the potential for further military service, the punitive discharge should be suspended and the post stockade designated as the place of confinement.

VII. PETITIONS FOR NEW TRIAL

Article 73, Uniform Code of Military Justice, provides that, at any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or more, an accused may petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review, or before the Court of Military Appeals, The Judge Advocate General must refer the petition to the board or

[43] See note 13, *supra*.

the Court, respectively, for action ; otherwise, The Judge Advocate General acts upon the petition.

There is no provision of law whereby an accused may be furnished counsel at government expense after the completion of appellate review.[44] In fact, following the decision of the Court of Military Appeals in those cases in which a petition for review has been submitted, appellate defense counsel in the Defense Appellate Division informs the accused that he no longer represents him.[45]

While it is true that an accused need not be represented by counsel on a petition for a new trial since the proceedings are nonadversary in nature, nevertheless, when he is a prisoner in the disciplinary barracks, it becomes the duty of the staff judge advocate to counsel him and, perhaps, to assist in the obtaining, through correspondence, of evidence.

In rendering this advice and assistance, the staff judge advocate does not function within the capacity of a legal assistance officer, as AR 600–103 precludes the furnishing of such assistance concerning military justice matters.

VIII. THE LEGAL ASSISTANCE PROGRAM

The legal assistance program at a disciplinary barracks is aimed not only at maintaining the morale and efficiency of the command at a high level but also is definitely an important part of the prisoner's rehabilitation program. While active military service precludes and avoids many legal problems, the change to a prisoner status seems to concentrate an individual's legal, marital, and financial problems. With the delivery of every bag of mail, the divorce actions, the "Dear John's," the creditors' letters, the sad, sad stories of parents, sweethearts, and relatives come pouring in. Experience has shown that a vigorous legal assistance program is essential to the satisfactory adjustment of the individual to prison life. While the legal assistance program is primarily designed to avoid worry over personal problems on the part of soldiers in order to leave them free to devote their best and undivided efforts to performing military duties, it goes much further in the case of those servicemen who have lost their freedom of movement. Prison confinement where his visitors are supervised, his correspondents limited, his mail inspected, pre-

[44] JAGJ, CM 376446, Pettet (12 Apr 1955).
[45] JAG FL 6 (5 Dec 1956).

sents a particularly complicated and confused problem to the young prisoner.

During the initial orientation of incoming prisoners, full explanation is given regarding the authorized activities of the legal assistance officer. As the individual becomes adjusted to prison life, he has sufficient time to think of his many troubles. The reputation of the legal assistance officer rapidly spreads through the prison. Good work results in more work. In that respect, a prison is no different than a civilian community.

IX. OBSERVATIONS AND RECOMMENDATIONS

Based upon this writer's experiences while assigned as the Staff Judge Advocate, Branch United States Disciplinary Barracks, Lompoc, California (1956–1958), and a rather comprehensive study of judge advocate activities within the disciplinary barracks system, the following observations are recorded:

1. The Commandant of each disciplinary barracks should be granted general court-martial jurisdiction under the authority of Article 22(*a*)(6), Uniform Code of Military Justice. It is submitted that this would result in maximum utilization of manpower, funds, and efficiency in the furtherance of current Army policy. It is not contemplated that the Commandant would exercise the authority granted insofar as referring cases for trial by general courts-martial. He would, however, be authorized thereby to handle the many administrative functions attendant upon the exercise of general court-martial jurisdiction, including the convening of boards for the elimination of unsuitable prisoners who might otherwise be returned to duty through technical errors resulting in the dismissal of charges against them or disapproval of the punitive discharge. This delegation of authority would result in improved discipline, increased morale, and greater interest in the rehabilitation program. In accordance with present regulations,[*] the officer exercising general court-martial jurisdiction over a prisoner at the time of the promulgation of the supplementary general court-martial order ordering the sentence into execution is limited to suspending until release from confinement with provision for automatic remission a punitive discharge not previously suspended. Prior to 22 January 1958, the officer exercising general court-martial jurisdiction over a prisoner confined in the disciplinary barracks had the authority not only to suspend punitive discharges but to mitigate, remit, or suspend, in whole or in

[*] Par. 2*b* and *b*(2), AR 633–10, 28 Oct 1969.

part, any unexecuted portion of a sentence pertaining to an unsentenced (adjudged) prisoner. It is believed the current Army policy, as enunciated in AR 633–10, dated *28* October 1959, impinges on the discretionary sentence powers granted to such convening authorities by statute. In this regard, no such restriction has been placed on the Air Force officer exercising general court-martial jurisdiction over Air Force prisoners confined in the Army operated disciplinary barracks.

2. Army Regulations 633–10, 28 October 1959, paragraphs 2*a*, b, and (2), should be amended to restore to the officer exercising general court-martial jurisdiction over adjudged prisoners and sentenced prisoners with suspended discharges confined in a United States disciplinary barracks the authority to mitigate, remit, or suspend any unexecuted portion of the sentence. The Commandant, as stated in paragraph 1, *supra*, is the most logical person to exercise such authority. He is personally familiar with the prisoner's response to the rehabilitation program as developed at the disciplinary barracks; he can conduct personal interviews; and he has access to the entire pretrial and post trial record of the prisoner. An additional and very significant factor is that the officer exercising similar jurisdiction over the Air Force prisoners confined in the disciplinary barracks has full authority and does often mitigate, remit, or suspend unexecuted portions of sentences of Air Force prisoners. This inconsistency in policies discriminates against Army prisoners and is the source of considerable irritation between the groups, resulting in the Air Force prisoners having higher morale, as they are cognizant of the fact that the Air Force continues to "look out" for their prisoners after incarceration. This recommendation is not to be construed to imply that the writer desires the Commandant to usurp the functions presently being performed by the Restoration Board in the Office of The Provost Marshal General or the Army-Air Force Clemency and Parole Board in the Office of the Secretary of the Army. It is advocated that the Commandant or the officer exercising general court-martial jurisdiction over an Army prisoner afford the prisoner such considerations as are authorized by the Code at the time he promulgates the supplementary general court-martial order, leaving to the Restoration Board and the Clemency and Parole Board their functions to further review those cases not receiving favorable action by the general court-martial authority.

3. The responsibility for the preparation, processing, maintenance, analysis and evaluation of records of prisoners confined

in the disciplinary barracks relating to the mitigation, remission, or suspension of unexecuted portions of sentences should be removed from the jurisdiction of The Provost Marshal General. It would seem to this writer that the Military Police Corps should limit its role at a disciplinary barracks to custodial responsibility, i.e., accept those committed to their custody, retain them in accordance with perscribed penological concepts, and release them when ordered to do so by proper authority, leaving to another agency of the Army the responsibility to determine the standards and conditions under which the prisoner is to be released. It appears to this writer that a policeman who is charged with the responsibility of investigating a crime, apprehending the culprit, and guarding him subsequent to trial is not unbiased when the time comes for consideration of the prisoner for restoration, clemency, or parole. This is all the more true when one considers the currently declining trend in the number of prisoners being confined as well as those already in confinement in disciplinary barracks; the consequent necessity to retrench in the type and number of educational, vocational, and maintenance projects; the dismissal or transfer of personnel; and the discontinuance of additional disciplinary barracks. One can easily appreciate the great difficulty a police officer would have in remaining unbiased when considering whether one of his key prisoners is deserving of a reduction in his period of confinement in order to be released into civilian life. To entrust youthful prisoners to the hands of a professional policeman for indoctrination, rehabilitation, and return to civilian life as good citizens with its attendant requirement for respect for the individual's legal rights, his confidence in the judicial system, and the administration of the laws of the land is contrary to our accepted practices in civilian life. The Judge Advocate General's Corps[47] would, in this writer's opinion, be a more appropriate service agency for assumption of this responsibility.

4. The authority delegated to The Provost Marshal General by the Assistant Secretary of the Army for creation of the Restoration Board and to take actions in connection with the approval and disapproval for restoration of individuals incarcerated in the disciplinary barracks should be withdrawn and such function consolidated in and exercised by the Army-Air Force Clemency and Parole Board. In this connection, the writer

[47] The governing control of the disciplinary barracks (U.S. Military Prison) was vested in The Judge Advocate General from 17 September 1913 to 4 March 1915 (Par. 146056, War Department, dtd 17 September 1913).

has serious doubts as to the power of the Secretary of the Army to delegate this function to The Provost Marshal General.

5. The staff judge advocate section at a disciplinary barracks must be assigned a sufficient number of legally qualified personnel to allow for the convenient separation of the usual installation judge advocate activities from those involved in the handling of appellate defense and legal assistance matters for prisoners. Widely misunderstood outside of the confinement facility proper is the fact that the supervision of military justice, the administration of military affairs, the furnishing of general legal services to the Commandant and legal assistance to prisoners confined in the disciplinary barracks are all duties placed upon the staff judge advocate as an integral element of the command.[48] Perforce the administration of military justice at an installation wherein a disciplinary barracks is located has one unique adjunct — the comprehensive activities relative to appellate matters. To avoid any taint of a "conflict of interest" in the counseling of a prisoner regarding the merits of his case or the preparation of his petition for review, it is mandatory that a sufficient number of qualified personnel be assigned to allow for a reasonable delineation of duties. It is not my intention to advocate two physically separated judge advocate offices for a disciplinacy barracks but rather to recommend one such office with a sufficient number of legally qualified personnel assigned thereto to allow dichotomous operations.

6. Supplementary general court-martial orders should be promulgated, recording the legal fact that each successive phase of the appellate review of a case has been accomplished and again ordering the sentence into execution when the appellate procedures have been completed. Finance and personnel administrators have been taught to rely upon the general court-martial order to spell out to them the applicable terms of the individual's reduction, forfeiture, and confinement. If no supplementary general court-martial order is promulgated, the personnel charged by law with the application of appropriate procedures will of necessity have to rely on assumptions or constantly contact the appropriate staff judge advocate section to ascertain the current status of an individual's appellate review. For example, an individual is sentenced to reduction, a bad conduct discharge, total forfeitures and confinement at hard labor for nine months. The convening authority approves and orders the sentence executed (whether he suspends the bad conduct discharge is immaterial).

[48] AR 1-140, 9 Dec 1957.

The case is automatically forwarded to the appropriate Judge Advocate General,[49] where it is referred to a board of review.[50] The board of review affirms the findings and sentence,[51] and the accused subsequently submits a petition for grant of review to the United States Court of Military Appeals[52] which denies the petition. Under our present system, we refer to Appendix 15*b*, *Manual for Courts-Martial United States, 1951,* and letter, JAGJ, CM **348479, 31** January 1952, and *do not* publish a supplementary general court-martial order. Of course, the Office of The Judge Advocate General is notified by electrical message that the accused has been officially advised of the fact that his petition has been denied. In the example, if after the board of review decision has been served on the accused, he chose not to petition the Court of Military Appeals, again, the Office of The Judge Advocate General would be notified by electrical message and, again, no supplementary general court-martial order would be promulgated. It is only in those cases wherein a change in the initial sentence approved by the convening authority occurs that the promulgation of a supplementary general court-martial order is required. Without the publication of a supplementary general court-martial order at each successive stage of the appellate procedures, there is no official final pronouncement to the interested agencies of the Government. The only record of appellate procedure having been completed is the paper emanating from the board or Court, and, with its limited distribution, all other interested agencies must, after a reasonable time has elapsed, simply assume that the proper procedures have been accomplished. It is submitted that, if a supplementary general court-martial order is considered necessary after a change has occurred in the sentence, as approved by the convening authority, it is just as essential that a supplementary general court-martial order be promulgated ordering the execution of a sentence upon its affirmance. Under the present system, if an accused person is restored to duty "pending completion of appellate review,'' a supplementary general court-martial order announcing that fact is required. It would again seem equally essential to promulgate a supplementary general court-martial order announcing the fact that an accused, having had a rehearing ordered in his case, is restored to duty and transferred for the purpose of the rehearing as

[49] **Art. 66(a), UCMJ.**
[50] **Art. 66(b), UCMJ.**
[51] **Art. 66(c), UCMJ.**
[52] **Art. 67(b)(3), UCMJ.**

ordered by the board of review decision and that "X" command has been designated as convening authority by The Judge Advocate General. There are those who will argue that these matters are now covered in appropriate special orders, but I maintain that general court-martial orders are the only proper military documents to recite and record judicial procedures and actions. If special orders are required for the issuance of travel requests, meal tickets, etc., then the special orders should cite as their authority the appropriate supplementary general court-martial order. Paragraph 9*f*, **AR** 22–10, 19 August 1957, as amended, appears to confirm this recommendation.[53] As few of the original (initial) general court-martial orders defer or suspend the application of the forfeitures, it appears mandatory that, in each instance in which a sentence is ordered into execution, a supplementary general court-martial order be promulgated, yet none is required.[54]

X. CONCLUSIONS

While the primary objective of the Army correctional program is to promote the rehabilitation of prisoners with a view to restoring to duty the maximum number of those qualified in order that they may eventually earn honorable discharges, the relatively small perecntage of those actually restored to duty, either directly from the disciplinary barracks or through the retraining program, leads to the inevitable conclusion that the program at the disciplinary barracks is designed to incarcerate unsuccessful soldiers and through effort, faith, leadership, and understanding rehabilitate them, *not for restoration to duty* but for return to civilian life as good citizens.

The number of prisoners confined in disciplinacy barracks has continually decreased since the period immediately following the Korean War. The decline in the number of admissions to disciplinary barracks reflects the now generally low number of offenders in the Army. In June 1957, the disciplinary barracks at Fort Gordon, Georgia, was inactivated; in January 1958, the disciplinary barracks at Fort Crowder, Missouri, was inactivated; the disciplinary barracks at New Cumberland, Pennsylvania, was

[53] "The Settlements Operations, Finance Center, U.S. Army, . . . and Chief, Army Audit Branch, General Accounting Office, . . . will each be furnished a copy of the supplementary orders promulgating results of affirming action in all cases where the original order approved a punitive discharge and the application of the forfeiture is *not* deferred or suspended pending completion of the appellate review."

[54] Ltr, JAGJ, CM **348479.**

discontinued in January 1959; and the disciplinary barracks at Lampoc, California, was inactivated in August 1959. The continuing downward trend in the number of court-martial cases will further reduce the requirements for a disciplinary barracks type of confinement facility.

The increasing utilization of administrative boards for the elimination of unsuitable personnel is another factor to be considered in determining the necessity for continued operation of a disciplinary barracks.

As a matter of fact, if the Department of Army policy[55] regarding the confinement of individuals in a Federal penal or correctional institution is more rigidly enforced, the entire disciplinary barracks system could be abolshed, for the Federal reformatory system, now utilized for youths and men under the age of **30** who are considered to be capable of rehabilitation, can easily be adapted to military needs. In these instituitions, almost half of the inmates are guilty of violating Federal laws related to transportation of stolen vehicles; approximately 15 percent have violated some phase of the Federal juvenile delinquency laws applying to boys under 18 years of age; the remaining have committed various other offenses not dissimilar to those crimes normally associated with individuals confined in disciplinary barracks as a result of having committed civil type felonies. **A** study of inmates of the Federal reformatories reveals startling similarities to those confined in the disciplinary barracks. The inmates of both institutions can be described as coming from limited social backgrounds which offered little in the way of vocational training and, of course, many have long prior records of delinquency. The program at both the disciplinary barracks and the Federal reformatory is designed to give the individual some type of vocational training that may be put to use when he leaves the institution. Both types of institutions offer various types of educational classes; particpation in recreational activities is encouraged; and medical care and religious training, as well as personnel counseling, are available. The Federal Bureau of Prisons operates other reformatories, principally designed for the receiving of youthful offenders whose background is primarily rural and economically and educationally substandard.

It must be understood, however, that there are other factors which weight heavily in favor of the Army's continued operation of its disciplinary barracks system. First, the public has seemingly been lured to the belief that a disciplinary barracks is not

[55] *See* note **28,** *supra.*

a prison. Consequently, it accepts a youth's confinement in an Army disciplinary barracks, whereas his transfer to a Federal reformatory or penitentiary would carry with it the stigma attached to such institutions. Secondly, there would be no appreciable saving in appropriations. The Federal system would need greater funds were they to accept military prisoners convicted to civil type offenses. Thirdly, the Army's penal system, generally conceded to be the best in the United States, would be lost. While it may be argued that a disciplinary barracks is a necessity only during wartime with our greatly expanded military forces, it must also be realized that personnel required to operate such institutions must be trained in peacetime. The time is now long past when untrained soldiers can successfully operate a modern penal institution.

MULTIPLICIOUS PLEADING*

BY CAPTAIN KENNETH L. YOUNGBLOOD**

I. INTRODUCTION

For a military offender to be charged with two or more offenses for acts arising from the same transaction is not new to military law. This practice, known as multiplicious pleading, has been characterized by the Court of Military Appeals as the recurrent problem of the "one or the many."[1] The present court-martial manual permits an accused to be convicted for all offenses arising out of the same transaction.[2] The difficulties that arise from an allegation of multiple offenses growing out of what appears to be a single transaction are met by the establishment of principles having to do with the imposition of sentence; for only if the offenses are separate may an accused be sentenced for each offense.[3]

The ease with which this principle may be stated is deceiving as to its applicability and even its popularity. For instance, in *United States* v. *Johnson* the Court said:

> "Certain difficulty fact situations which appear to smack of unfairness in doubling the punishment for what might be regarded as one omission have required this court to seek a judicial means of answering perplexing questions. This case presents another factual version which is filled with doubt and for little reason. In the end result multiplicity would be of little importance if the military services followed the previous rule that where an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court-martial must limit imposition of punishment to the act or omission in its most important aspects."[4]

In *United States* v. *Larney*, the Court observed that if courts-martial did not use some discrimination in testing findings for similarity of offenses, appellate tribunals would be processing

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[1] U.S. v. Modesett, 9 USCMA 152, 25 CMR 414 (1958).
[2] Par. 76*a*(8), MCM, 1951.
[3] U.S. v. Soukup, 2 USCMA 141, 7 CMR 7 (1953).
[4] 5 USCMA 297, 17 CMR 297, 299 (1954).

many cases to correct improper sentences.[5] The large number of decisions thereafter rendered by the Court concerning this very problem established the accuracy of the court's phophesy and the difficulty in determining just what constitutes separate offenses in any given fact situation.

Often, when more than one charge is lodged against an offender, the accuser's motives are immediately suspect. It has been observed that prosecutors have a propensity to allege as many offenses as the transaction is capable of supporting.[6] At least one writer is of the opinion that under the military procedure a malicious accuser is free to inflame the court by the preferring of multiple charges.'

One should not be too quick to condemn multiplicious pleading, however, as it can properly serve a legitimate purpose. It is submitted that the evidence in every case may not be susceptible of only one charge. *For example,* in a rape case where there is some doubt as to whether the fifteen year old victim will continue to maintain her expected testimony as to her lack of consent, could not a charge of carnal knowledge properly be preferred in addition to the charge of rape? Similarly, it is not difficult to imagine a staff judge advocate in a general court-martial jurisdiction reviewing charges arising from Private Smith's dispute with his company commander. In a typical case, Private Smith could, and probably would, be charged with disrespect to his superior officer, willful disobedience, provoking speech and communicating a threat. Multiplicious pleading? Of course. But which charges should remain in order to meet exigencies of proof and which should be striken in fairness to the accused? Of those remaining which are separate offenses for punishment purposes and how are these determined? The answer to these perplexing questions is not always readily apparent.

11. HISTORICAL DEVELOPMENT

In the early days of military justice, the multiplication of charges was generally "discountenanced."* But where the accused's act involved several distinct offenses, he could properly be arraigned upon the same number of separate charges.[9] It

[5] 2 USCMA 563, 10 CMR 61 (1953), overruled on other grounds by U.S. v. Granger, 9 USCMA 719, 26 CMR 499 (1958).

[6] U.S. v. Morgan, 8 USCMA 341, 24 CMR 151 (1957).

'Everett, Military Justice in the Armed Forces of the United States, 141 (1956).

[8] Dig. Op. JAG 1866, p. 46; Record Books, vol. XII, p. 348 (Feb 1865).

[9] Dig. Op. JAG 1880, p. 147; Record Books, vol. XXX, p. 489 (Jul 1870).

was considered undue multiplication of charges, however, to add charges for minor offenses which were simply acts included in, and going to make up, graver offenses already charged.[10] Apparently even in this period those who drafted charges at times had trouble knowing how the evidence in the case would ultimately turn out. The opinion was expressed that the prosecution was at liberty to charge an act under two or more forms, where it was doubtful under which it would more properly be brought by the testimony. Under such procedure, the accused was not entitled to call upon the prosecution to elect under which charge it would proceed.[11]

The noted military justice chronologer, Colonel William Winthrop, reported that in cases where the offense apparently fell equally within the purview of two or more Articles of War, or where the legal character of the act of the accused could not be precisely known or defined until developed by the proof, it was not unfrequent to state the accusation under two or more charges.[12] It was thought desirable, where the two articles imposed different penalties, to prefer separate charges thus giving the court wider discretion as to the punishment. Colonel Winthrop admonished, however, that, where the case fell quite clearly within the definition of a certain specific article, to resort to plural charges was neither good pleading nor just to the accused. In view of the court-martial's authority to make substituted findings where the proof fails to establish the specific act alleged, the charging of the same offense under different forms was much less frequently called for in the military than in civil practice.[13]

Apparently the maximum authorized sentence could be adjudged for all charges upon which the accused was found guilty.[14]

III. MULTIPLICITY OF CHARGES PRIOR TO THE UNIFORM CODE OF MILITARY JUSTICE

A. *Manual for Courts-Martial, 1921*

The provisions of the 1921 Manual were, for the purposes of considering multiplicity of charges, identical with those of the earlier Manual promulgated in 1917. A study of these provisions reveal no startling change. Generally, the prohibitions previously

[10] Record Books, vol. XV, p. 441 (Jul 1865).

[11] Record Books, vol. XXXIII, p. 306 (Aug 1872).

[12] Winthrop, Military Law and Precedents, § 206 at 143, § 214 at 148 (2d Ed., 1920 reprint).

[13] Winthrop, *passim*.

[14] Winthrop, *op. cit.* fn. 12 at 404.

announced and tolerations previously permitted were adopted. However, a specific admonition as to the maximum sentence that should be adjudged and approved in cases involving multiplicious charges was now present.

Paragraph 66 stated pertinently:

> "The duplication of charges for the same act or omission will be avoided except when by reason of lack of definite information as to available evidence it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses, the court, even though it arrived at a finding of guilty in respect of two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect, and if this rule be not observed by the court the reviewing authority should take the necessary action. . . ."

Despite the guidance of paragraph 66 of the Manual, "duplication," or multiplication, of charges continued. Charging an included offense with the major offense appeared to be the type of improper pleading most indulged in. It was held to be improper pleading to charge an accused with two specifications, one for assault with intent to commit a felony and the other for robbery, when the assault charged was included in the robbery.[15] Also, conversion of property was considered to be included with larceny,[16] and absence from guard duty was included in absence without leave.[17] Assault with intent to do bodily harm by threatening another with a knife was held to be but one element of the offense of assault with intent to commit sodomy and, accordingly, should not have been charged separately.[18] After charging an accused with bigamy, he was further charged with the incidents of that offense, adultery with the same woman. This was considered to be contrary to good practice as well as to the express provisions of paragraph 66 of the Manual.[19]

It was not a duplication of charges for an accused's one act to result in a charge of felonious assault under Article of War 93 and also a charge of assault upon his superior officer, under Article of War 64. This result was arrived at because the first offense was of a civil nature and the second was purely a military offense.[20] Nor was it improper to convict an accused of

[15] CM 120542 (1918), Dig. Op. JAG 1912–40, § 428(5).
[16] CM 135839 (1919), Dig. Op. JAG, *supra*, fn. 16.
[17] JAG 250.3, 15 Feb 1924, Dig. Op. JAG 1912–30, § 1443, p. 717.
[18] CM 143403 (1921), Dig. Op. JAG 1912–40, § 428(5)
[19] CM 122371 (1918), Dig. Op. JAG, *supra*, fn. 18.
[20] CM 153372 (1922), Dig. Op. JAG, *supra*, fn. 18.

desertion and misbehavior before the enemy where the absence relied on as misbehavior before the enemy was the same absence for which he was charged with desertion.[21]

Pursuant to paragraph **66** of the Manual, upon review of those cases where a multiplication of charges was found, the sentence was adjusted to punish the accused's act or omission only in its most important aspect. Thus, punishment was based on the wrongful possession, rather than the wrongful use, of cocaine;[22] and assault upon a superior officer was found to be the more important aspect of a second charge of felonious assault because it included the "civil" offense of felonious assault and, in addition, a breach of military discipline.[23] When, upon review, it could be determined from the facts, circumstances and the sentence imposed, that the erroneous multiplication had been punished by the court in its most important aspect, further corrective action was not considered necessary.[24]

B. *Manual for Courts-Martial, 1928*

The **1928** Manual failed to include a positive prohibition against unreasonable multiplication of charges. Paragraph **27** stated pertinently :

> "One transaction, or what is substantially one'transaction, should not be made the basis for an unreasonable multiplication of charges against one person. . . . However, there are times when sufficient doubt as to the facts or law exists to warrant making one transaction the basis for charging two or more offenses."

Limitations on punishment of offenses arising from one transaction were set forth in paragraph 80*a*:

> "If the accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court should impose punishment only with reference to the act or omission in its most important aspect."

Although the intent of paragraph **27,** cited above, appeared obvious, boards of review differed in their interpretations of it. Some held that this provision was directory only; others considered it to be mandatory. For example, those boards of review taking the less restrictive view held that an accused might be punished for an escape from confinement and a concurrent desertion,[25] a failure to repair and rendering one's self unfit for duty

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[21] **CM 130018 (1919),** Dig. Op. **JAG,** *supra,* fn. **18.**

[22] **CM 156134 (1923),** Dig. Op. **JAG 1912–40, § 402(2).**

[23] **CM 153372 (1922),** Dig. Op. **JAG,** *supra,* fn. **22.**

[24] Dig. **Op. JAG 191240, § 428(5),** *passim.*

[25] See cases cited in **CM 313544,** Carson, **63 BR 137 (1946).**

by use of intoxicating liquor,[26] and for manslaughter and reckless driving "while drunk" resulting in a death.[27]

Considerable insight can be gained as to the varying treatment then accorded to multiplicious charges by considering the contents of memoranda attached to the record of trial in the case of the *United States* v. *Gallagher*.[28] In the *Gallagher* case, officially unreported but discussed in the *United States* v. *Carson*,[29] the accused was convicted of a thirty-nine day absence without leave and breach of arrest, both offenses committed concurrently on March 11, 1930. The sentence approved by the reviewing authority was in excess of that which could have been imposed had the accused's act been punished only in its most important aspect. A board of review, without opinion, held the record of trial legally sufficient to support the sentence,

However, attached to the record of trial when finally filed was the following memorandum :

> "This case brings up a conflict in rulings between the Board of Review and the Military Justice Section. The Board of Review has consistently held for many years that par. 80*a* does not prohibit punishment for two offenses arising out of the same act if one offense is not a lesesr included offense of the other. Thus the B/R has held that an accused may be punished for both desertion and escape from confinement; which is analagous to this case. This holding of the B/R is consistent with the decision of the U. S. Supreme Court in analgous cases. . . . On the other hand the Military Justice Section has held that par. 80*a* does apply."

The other memorandum, initialed by two members of the board of review, stated:

> "I find no inconsistency. The Board has never held, and neither has the Section, that *80a* is a legal limitation. It expresses a *policy* which the Section has tried to get the field to follow. The Board approves such procedure; and raises a question for the J.A.G. as to whether the policy applies here."

Apparently The Judge Advocate General decided the policy did not apply here, as he approved the holding of the board of review that the record of trial was sufficient to support the sentence.

Subsequently, the term "unreasonable multiplication" in paragraph 27 of the Manual was construed to connote "unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved."[30]

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[26] CM 186486 (1929), Dig. **Op.** JAG 1912–40, § 428(5)

[27] CM 191695 (1930), Dig. Op. JAG, *supra*, fn. **26.**

[28] CM 192147 (1930).

[29] CM 313544, Carson, 63 BR 137,139 (1946).

[30] CM 196619, Govette, 3 BR 26 (1931).

The real turning point came in 1946 when a board of review considered the *Carson* case.[31] The accused was charged with escaping from confinement on March 4, 1946, and absenting himself without leave from that date until March 13, 1946. The board of review concluded that the escape without leave. After a comprehensive review of other decisions, it expressed the view that paragraph 27 of the Manual, against unreasonable multiplication of charges upon one transaction, and the provision of paragraph 80*a*, limiting punishment of such charges, must be construed together, Under such construction paragraph 80*a* was a positive and mandatory rule of limitation. Thus, the rule emerged that where a sentence was imposed for two or more offenses constituting but different aspects of the same act or omission, so much thereof as exceeds the maximum authorized penalty for the most important aspect of the act or omission is illegal. As the board of review put it:

> "To hold otherwise would be to sanction dual punishment for substantially the same act, out of all reasonable proportion to the full demands of justice, through the simple expedient of splitting it into its different aspects and charging each as a separate offense; this would be a violent perversion of the spirit of the prohibition against unreasonable multiplication of charges contained in paragraph 27 of the Manual for Courts-Martial and would convert it into a mere devise to promote injustice and wrong."

The "most important aspect" was that for which the most severe punishment was authorized, that is, the escape from confinement.

It was then stated that previous expressions by The Judge Advocate General and holdings of the boards of review stating or implying to the contrary should not be followed. The Judge Advocate General approved this holding July 15, 1946.

The rationale in the *Carson* case was followed in subsequent cases considered under the 1928 Manual.[32]

C. Manual for Courts-Martial, 1949

Paragraph 27 contained an almost identical provision with paragraph 27 of the 1929 Manual against making one transaction the basis for an unreasonable multiplication of charges against an accused. However, paragraph 80*a*, in setting forth the basis for determining the proper punishment for an offense, said :

[31] CM **313544,** Carson, **63 BR 137,139 (1946).**
[32] CM **328401,** Still, **77 BR 65 (1948).**

> "If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most important aspect."

Thus, in accord with the Carson case, the provision against punishing one act for more than its most serious aspect went from "should not" to "would not."

From the number of records of trail received by the boards of review that continued to involve unreasonable multiplication of charges, accusers and convening authorities apparently did not pay any more attention to paragraph 27 of the 1949 Manual than they had its predecessors. Nevertheless, the boards of review alleviated this situation by treating paragraph 80*a* of the Manual as a positive and mandatory rule of limitation.[33] In the first case in which a board of review considered paragraph 80*a* it was held that absence without leave and breach of arrest committed contemporaneously could be punished only in their most important aspect, the breach of arrest.[34] Thereafter, absence without leave was held not to be separate from failure to obey a lawful order to report;[35] breach of restriction and failure to obey a lawful order were but different aspects of the same act;[36] as were desertion and disobedience of special orders to proceed when the accused's act in absenting himself without leave supplied one of the elements of the desertion charge and was also the basis of the disobedience offense.[37]

In one case the board of review, in a somewhat charitable rationale, illustrated the extent to which it would go to comply with the Manual directive to punish an act only in its most important aspect.[38] At the time the accused's offenses were committed he was a prisoner, under guard, on a work detail. While so engaged he grabbed his guard's carbine. Holding the carbine at port arms, he told the guard not to follow and then ran into the woods. After his escape he threw the carbine into a bunch of bushes.

As a result of these acts, after his return to military control he was charged with escape from confinement, larceny of the

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"SPCM 1738, Edward (BR), 6 BR–JC 339 (1950).

"SPCM 125, Igo (BR), 3 BR–JC 373 (1949); accord, SPCM 250, Howe (BR), 4 BR–JC 413 (1949).

[35] CM 345388, McDonough (BR), 11 BR–JC 159 (1951).

[36] SPCM 1711, Davis (BR), 6 BR–JC 335 (1950).

[37] CM 34500, Langley (BR), 12 BR–JC 215 (1951).

[38] CM 337804, Albright (BR), 4 BR–JC 113 (1949).

carbine and a sixty-two day absence without leave. All offenses were alleged to have been committed on March 8, 1949.

The board considered that, as the escape marked the initial date of the subsequent absence without leave, these two offenses were but different aspects of the same act, punishable only in their most important aspect, the escape. As to the larceny of the carbine that the accused had taken from his guard while escaping, the board was of the opinion that this act was so closely connected with the escape as to be a "component phase" of the same act. The board said normally four walls and iron bars are utilized to provide the physical restraint that is the essence of confinement. But where, as here, the military elects to use armed guards to effect the physical restraint and the prisoner dissipates this restraint through disarming the guard by snatching his weapon, the theft of the weapon was but an incident of the act of escape.

The board acknowledged the theft to be a separate and distinct offense from the escape. Regardless, it was constrained to hold that the larceny, the escape, and the absence without leave involved substantially the same act. This was so to such an extent that to permit it to be split into its different aspects for purposes of increasing the allowable punishment would be a perversion of the spirit of the prohibition against punishment for the same act in its different aspects. Accordingly, only punishment for the escape from confinement was permitted.

IV. SEPARATE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE

A. *The Blockburger Rule*

The Supreme Court, in *Blockburger* v. *United States*,[39] pronounced a rule concerning the separateness of offenses that had had considerable effect upon the military system of pleading. In the *Blockburger* case, the defendant was charged with violating provisions of the Harrison Narcotic Act.[40] He was convicted on three counts of the indictment. Each of these counts charged Blockburger with selling morphine hydrochloride to the same purchaser. One alleged a sale, on a specified day, of ten grains of the drug not in or from the original stamped package. Another count alleged a sale on the following day of eight grains not in

[39] 284 U.S. 299 (1932).

[40] Act of 17 Dec 1914, ch. 1, § 1, 38 Stat. 785 (now Int. Rev. Code of 1954, § 4704(a)); and ch. 1, § 2, 38 Stat. 785, 786 (now Int. Rev. Code of 1964, § 4705(a)).

or from the original stamped package. The last count charged that the latter sale was not made in pursuance of a written order of the purchaser, as required by the statute. Blockburger was sentenced to five years imprisonment and a two thousand dollar fine on each count, the terms of confinement to run consecutively.

On appeal to the Supreme Court, he contended that his punishment was multiplicious in that (1) the two sales charged, having been made to the same person, constituted a single offense; and (2) the sale without a written order and the same sale charged as having been made not from the original stamped package constituted but one offense for which only a single penalty lawfully may be imposed.

The Court, speaking through Mr. Justice Sutherland, disposed of the defendant's first contention by stating that the sale of narcotics is not a continuing offense, such as wrongful cohabitation. Each sale constitutes a distinct offense however closely it may follow another.

The defendant's second contention was also considered without merit. The Court said the statute created two distinct offenses: one, selling the forbidden drug except in or from the original stamped package; and two, selling the drug not pursuant to a written order of the person to whom sold. The Court said:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requiries proof of an additional fact which the other does not."[41]

Applying this test, the Court concluded that both sections were violated by the one act and two offenses were committed. Indicating that the sentence adjudged by the trial court seemed unduly severe, the Court nevertheless affirmed the judgment.

On June 30, 1958, a divided Court, in a case almost identical with *Blockburger* on the relevant facts, declined to overrule this decision.[42] The Court pointed out in support of affirmance that the three statutory provisions that the petitioner was charged with violating had different origins both in item and design. A reading of the opinion reveals that the Court was quite concerned over the non-medicinal sale of narcotics, "a social evil as deleterious as it is difficult to combat." Reasons for the dissenting

[41] 284 U.S. at 304.

[42] Gore v. U.S., 357 U.S. 386 (1958); *accord,* Harris v. U.S., 27 U.S.L. Week 4187 (U.S. Mar 2, 1959).

opinions were varied. Chief Justice Warren argued that Congress had provided three avenues by which to prosecute one who traffics in narcotics, not three cumulative punishments for the deefndant who consummates a single sale. Mr. Justice Douglas, joined by Mr. Justice Black, took the position that the *Blockburger* case should be overruled because the rule laid down therein was in violation of the constitutional provision against double jeopard. Mr. Justice Brennan dissented on the ground that *Blockburger* permits multiple punishment only where each provision allegedly violated requires proof of a fact that the other does not. The decision of the majority was inconsistent with this principle, his opinion stated, because it allowed separate offenses to be proved and separate punishments to be imposed upon the proof of a single fact, that is, possession of unstamped narcotics.

Apparently the Supreme Court's position on separateness of offenses will remain as announced in *Blockburger* and *Gore.*

B. *Legislative Intent*

Examination into the history of the preparation of the *Manual for Courts-Martial, United States, 1951,* indicates that the drafters intended to adopt the "Blockburger rule" with regard to determining separate offenses arising out of one transaction. One of the principal reasons for such adoption was that Federal Courts could be looked to for precedent. It was hoped to "eliminate the need for unnecessary corrective action by reviewing authorities in that, if the sentence is supported by a good specification, it will be unnecessary to determine whether the offenses are separate."[43] What was desired in court-martial practice was the application of a "reasonable rule." For instance, it was not contemplated that an accused be charged with both a principal offense and a lesser included offense. However, it was considered that a single transaction might be the basis of several offenses if necessary to meet the contingencies of proof. Punishment in such cases, however, could be given only for separate offenses.[44] For several separate and distinct offenses, even though they be alleged in the same charge, it was intended that the court, in its discretion, could adjudge the aggregate of the limit of punishment for each separate and distinct offense in a case.[45]

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[43] *Legal and Legislation Basis, Manual for Courts-Martial, United States* **1951, at 78.**

[44] *Id.* **at 41.**

[45] *Id.* **at 189,190.**

C. *Manual for Courts-Martial, United States, 1951*

In light of the foregoing background, and considering their importance, it is essential to examine those provisions promulgated in the *Manual for Courts-Martial, United States, 1951,* dealing with multiplicious pleading.

Paragraph **26b** states in pertinent part:

> "One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person. . . . There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses . . . ."

Paragraph 74*b*(4) states than an accused "may be found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offense are separate."

Paragraph 76*a*(8) states:

> "The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied in determining whether the offenses of which the accused has been convicted are separate is this: ***The offenses are separate if each offense requires*** *proof* ***of an element not required to prove the other.*** Thus, if the accused is convicted of escape from confinement (Art. **95)** and desertion (Art. 85)—both offenses arising out of the same act or transaction—the court may legally adjudge the maximum punishment authorized for each offense because an intent to remain permanently absent is not a necessary element of the offense of escape, and a freeing from restraint is not a necessary element of the offense of desertion. An accused may not be punished for both a principal offense and for an offense included therein because it would not be necessary in proving the included offense to prove any element not required to prove the principal offense." (emphasis supplied)

A lesser included offense is defined in paragraph 158:

> "An offense found is necessarily included in an offense if all of the elements of the offense found are necessary elements of the offense charged. An offense is not included within an offense charged if it requires proof of any element not required in proving the offense charged or if it involves acts of which the accused was not apprised upon his arraignment."

V. MULTIPLICITY AND THE COURT OF MILITARY APPEALS

A considerable number of cases involving multiplicious pleading have now been decided by the Court of Military Appeals. As shall be seen, the seemingly simple rule set forth in the *Manual* for determining separateness of offenses has not been followed by the Court. In general, the Court's approach has been on a case-by-case basis. However, during the Court's considera-

tions certain discernible tests have been applied in determining the separateness of the offenses of which accused have been convicted.

A. *Tests Used to Determine Separateness of Offenses*

1. Separate Elements

The first case in which the Court decided it was necessary to construe the Manual provisions regarding multiplicity was *United States* v. *Yarborough.*[46] The Court rather mechanically applied the "separate elements" standard and found that there was no basis for a claim of multiplicity as conspiracy to malinger and malingering were separate offenses.

In the Johnson case,[47] the Court considered whether specifications alleging desertion with intent to remain away permanently and desertion by enlistment in another armed force were separate. While absent without leave from the Navy, Johnson had enlisted in the Army without disclosing his former affiliation. The Court stated that an application of the Manual-Blockburger test would constitute the offenses as separate ones. But the principal question with which it was concerned was not separability but whether Article 85(a)(3), the section proscribing desertion by enlisting in another armed force, created a substantive offense at all. It was held that Congress had sought merely to perpetuate a rule of evidence by which the prosecution could prove absence without authority with intent to remain away permanently and had not created a new and separate offense.

2. Separate Duties

The "separate element" test was again applied by the Court with a "separate duties" alteration in *United States* v. *Soukup,*[48] where the accused was charged with misbehavior before the enemy, through cowardly conduct, and willful disobedience of a lawful order. The accused, who had been stationed with his company at the front in Korea, was found three or four miles to the rear. When ordered to return to his unit, he refused to do so. The Court, when examining the charges, was of the opinion that the standard of separate elements was fully effective when applied to the facts of this case and that the offenses were entirely separate. The author judge, Judge Brosman, further noted that two "separate duties" were breached: the one to remain with his

[46] **1 USCMA 678, 5 CMR 106 (1952).**

[47] U.S. **v. Johnson, 5 USCMA 297, 17 CMR 297 (1954).**

[48] **2 USCMA 141, 7 CMR 17 (1953).**

company on the line—the other to obey the direct and specific order to return thereto.

In a similar type case,[49] the Court again held against the accused on the question of multiplicity. The facts in that case showed the accused reported for duty at the forward command post of Company A. An officer informed him he was being assigned to a platoon in position on a designated hill. The accused replied that he could not go to the assigned area and when the order was repeated, repeated this answer. The Court said the specifications and facts were similar to *Soukup* and so established separate offenses. Judge Brosman, concurring in the result, was not at all sure that this case was similar to *Soukup*. He believed that if the accused was under a pre-existing legal duty to serve with the 2d Platoon at the time he was ordered to do so, then a *Soukup* situation would exist. Judge Brosman assumed he was not under such a duty and, accordingly, the Court's analysis in *Soukup* required a conclusion that the charges were multiplicious.

3. *Material Facts*

United States v. *Larney*[50] involved charges of absence without leave from a Naval training station and failing to obey an order to report to the same training station. There, Judge Latimer, speaking for the majority of the Court, said if two offenses are not identical in that each requires proof of a material fact that the other does not, there could be no question but that they are separate.

Larney has now been overruled,[51] but therein Judge Brosman, in a separate opinion, observed what he considered confusion in the way the principal opinion implied that the terms "element" and "fact" could be used interchangeably in the solution of multiplicity problems. He stated pertinently:

> "Certainly the term 'element' should not be used in a generalized or in vacuo sense, but must always be related to the facts of the individual case. Disregard of this, I believe, can only lead to error."[52]

In the *Redenius* case,[53] the Court again spoke in terms of "material facts." Redenius was charged with desertion with intent to remain away permanently and desertion with intent to shirk im-

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[49] U.S. v. Wallace, 2 USCMA 595, 10 CMR 93 (1963); cf. U.S. v. McCormick, 3 USCMA 361, 12 CMR 117 (1953).

[50] 2 USCMA 563, 10 CMR 61 (1953).

[51] U.S. v. Granger, 9 USCMA 719, 26 CMR 499 (1958).

[52] 2 USCMA 563, 572, 10 CMR 61, 70 (1953).

[53] 4 USCMA 161, 15 CMR 161 (1954).

portant service. Both charges set out the same period of absence and alleged the same manner of termination. The evidence showed that orders had been issued transferring the accused to Camp Stoneman, California, for further shipment to the Far East Command. He did not report by July 7, 1952, as ordered, and was apprehended on September 11, 1952. At the trial the defense counsel moved to strike Specification 1 on the ground of multiplicity but the motion was denied. The Court stated that since different intents were set out in each specification and present intent may be regarded as fact, a superficial application of the Blockburger test would make it appear that two offenses were described. The Court pointed out, however, that the only "material fact" set out in the second specification, or found in the proof, that could give rise to an inference that the accused intended to shirk important service was the imminence of his shipment to the Far East Command. The only place this fact appeared was his assignment to Camp Stoneman for such shipment. Yet, the facts of the accused's assignment to, and departure from, Camp Stoneman were "material facts" in proof of the specification alleging an intent to remain away permanently. The Court went on to say that in desertion imminent overseas shipment may supply an inference of two different intents, either of which is sufficiet to complete the offense. As inferences, the different intents are not self-sustaining facts; instead, they find support only in the overt act. Under the allegations and proof in this case, the single overt act was identical for both specifications. Hence, the intent which could be inferred from the one overt act may be one or the other of the two possibilities, but it could not properly be split into fractions of each. The Court then concluded that, under the allegations and proof, the specifications were not separate according to either the Blockburger rule or the Manual test.[54]

The Court also pointed out that under the "duality of duty" test, as set out in *Soukup, supra,* only a single offense appears. The accused's only duty was to remain with his organization until reassigned. "Where an 'identification of duty' underlies two ostensibly different offenses, there is but a single offense."[55]

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[54] *Accord,* U.S. v. Dehart, 4 USCMA 556, 16 CMR 130 (1954), where Government appellate counsel conceded it could not distinguish U.S. v. Rendenius, *supra,* fn. 53.

[55] U.S. v. Redenius, 4 USCMA 161, 167, 15 CMR 161, 167 (1954).

4. *Legal Norms*

In the *United States* v. *Beene*, the Court viewed the problem of multiplicity "through the spectacles of legal norms or standards."[56] Beene had been convicted of drunk driving, resulting in personal injury to a German National, and also involuntary manslaughter arising from the death of that same person. In the Court's opinion Judge Brosman emphasized that the Court had sought to avoid a "doctrinaire approach'' to the problem of multiplicity. It was pointed out that the "duties" adverted to in *Soukup* and *Redenius* were but the correlatives of juristic norms requiring adherence. These norms—or standards — are designed to facilitate societal living and punishment will be ascribed in accordance with the number and value of the norms transgressed. The Court reasoned that whether Congress intended to erect separate norms in a case like the present one could be determined by considering the gravamina of the offenses. It found the gravamen of Article III wholly different from that of Article 119 and that separate norms were established. Further it was explained:

> ". . . the two offenses are separately punishable under *any* test of which we are aware — that is, they are characterized by two gravamina, two ethical norms, two duties, two sets of elements and even two sets of facts."[57]

It was pointed out that injury resulting from drunken driving was not an element of the offense of drunken driving, but rather constituted an aggravating circumstance; and the addition of aggravating circumstances, in this case, would have no effect on the question of separateness.[58]

Apparently, as these charges would have withstood any separability test, there was little need for the Court to bring forth the "legal norm" test in a field which was already being filled with enough perplexing tests and approaches. Probably the best thing about the "legal norms" test is that it has not been followed by the Court since its initial announcement. The Court may have felt somewhat on the defensive in deviating from its previous concepts, for it stated:

> "It is suggested that the views proposed here are in no wise immiscible with those expressed by the Supreme Court in the Blockburger case. Blockburger indicates that each count of an indictment must require proof of a distinct and additional fact in order that it may con-

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[56] **4** USCMA **177, 179, 15** CMR **177,179 (1954).**

[57] *Id.* at **182,** 15 CMR at **182.** But cf. U.S. v. Nelson, **3** USCMA 482, 13 CMR **38** (1953), where the Court assumed, without deciding, that similar charges were not separable.

[58] Compare U.S. v. McVey, USCMA **167, 15** CMR **167 (1954).**

stitute a basis for separate punishment. Our point simply is that this *fact,* of which proof is demanded, must be significant in that it involves the infringement by the accused of a distinct norm etsablished by society through its lawmaking agencies. In short, this separate *fact* must constitute the open sesame to a separate norm. To require less would be to permit the multiplication of punishments through the artful, but meaningless, rephrasings of the prosecutor."[59]

B. *Question* of *Lesser Included Offenses*

There is another approach to the problem which, although not possessing such eye-catching labels as other tests devised by the Court, is probably the mot important one. This deals with the question of lesser included offenses. The *Manual* provides in paragraph 76*a*(8) that an accused may be punished for separate offenses arising out of the same act or transaction but he may not be punished for both a principal offense and for an offense included therein. Paragraph 158 states that an offense found is necessarily included in an offense charged if all of the elements of the offense found are necessary elements of the offense charged. Thus, as a general rule, it may be determined whether an offense is included within another by considering the elements of proof required for each of the two offenses. However, this rule must be modified at times in order to achieve proper results, as was demonstrated in *United States* v. *Davis.*[60] Davis was charged with felony murder. The court-martial, by excepting the reference to the perpetration of armed robbery alleged in the specification, found him guilty of unpremeditated murder. In considering whether unpremeditated murder was an offense included within felony murder, the Court said that the paragraph 158 rule was a sound and workable one in most cases but "badly fails" in homicide cases. Under the test in paragraph 158, the Court reasoned, unpremeditated murder could not be found as a lesser included offense within felony murder as it is not necessary to establish that the accused caused the death of his victim with an intent to kill or to inflict great bodily harm in order to prove felony murder. If unpremeditated murder cannot be lesser included, it must be a separate offense within the definition of paragraph 76*a*(8) of the *Manual* as each offense requires proof of an element that the other does not. The Court pointed out that if this is true, and the facts of a case would sustain both offenses, then the accused could be charged and sentenced for each separately. "No one—we dare suggest—would countenance such a

[59] U.S. v. Beene, 4 USCMA 177, 180, 15 CMR 177, 180 (1954).

[60] 2 USCMA 505, 10 CMR 3 (1953).

result."[61] From this emerged the Court's principle that whether another variety of homicide was necessarily included within that charged "depends almost exclusively on *the facts stated and proved in support of the offense alleged.*"[62]

The Court does not restrict the principle announced in the *Davis* case to homicide offenses.[63] Accordingly, the application of this rule has had a far reaching effect on the problem of multiplicity, as shall be seen by the later cases considered by the Court.

A case of some importance is *United States* v. *McVey*.[64] In this case, the accused was charged with robbery and assault with a dangerous weapon. Both offenses were based on the same transaction of robbing and assaulting a taxicab driver in Japan. The robbery specification alleged the robbery was committed by force and violence and by putting in fear but the specific means of the '(force and violence" were not identified. The evidence showed that, after riding around for some time in the taxicab, McVey attempted to strangle the driver with a belt. When the driver broke loose, he was struck over the head with a wooden club. The driver fled leaving behind his taxicab and money. The accused drove off in the cab. It was found later but the driver's money was missing. The Court pointed out that the fact the driver was struck with a club and strangled with a belt lay at the core of the offense of robbery and that these facts were the only means which would sustain the allegation and proof of force and violence. "These acts were not divisible, factually or legally, and if they were, qualitatively, greater force than necessary to support an allegation of robbery, they were nonetheless essential to this robbery specification."[65] It concluded, speaking through Judge Latimer, that where, as here, the allegations of the specification are broad enough to permit proof of the use of a deadly weapon, and its use constitutes the force and violence of the robbery charge, an aggravated assault is not a separate offense but is a lesser crime included within the robbery.[66]

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[61] *Id.* at 509, 10 CMR at 7.

[62] *Id.* at 508, 10 CMR at 6.

[63] U.S. v. Hobbs, 7 USCMA 693, 23 CMR 157 (1957); see U.S. **v.** Beene, 4 USCMA 177,178, 15 CMR 177, 178 (1954).

[64] **4** USCMA 167, 15 CMR 167 (1954).

[65] *Id.* at 174, 15 CMR at 174.

[66] *Accord*, U.S. v Walker, 8 USCMA 640, 5 CMR 144 (1958), wherein Quinn, C. J., dissents on the ground that the evidence shows two acts sufficiently separate in time and condition to constitute two offenses; U.S. v. Cooper, 2 USCMA 333, 8 CMR 133 (1953).

1. *Absence Without Leave Charged With Other Offenses*

"As it is true that a rose by any other name would smell as sweet, so it is equally true that a man may be punished only once for the same offense regardless of how that offense is labeled."[67] Thus spoke Judge Ferguson for the Court in the *Posnick* case, holding that the offense of absence without leave is a necessarily included lesser offense of the offense of missing movement and that, when the absence alleged in each charge is the same, the charges are multiplicious.

The facts in *Posnick* are simple. The accused was absent without leave from his unit, a Naval ship, for about a week and during the same week, through neglect, missed the movement of his ship. The Court, in considering the case, professed to reject at least the nomenclature of its previous rules in favor of "the fundamental rule that a person may not be twice punished for the same offense."[68] The Court stated that if the evidence sufficient to support a conviction on one charge will support a conviction an another charge, the two charges are not separate. This is so, it was pointed out, because when this test is met the "offenses" alleged are in reality the same offenses.

The Court concluded that "logically" every missing movement offense includes an unauthorized absence plus other factors.[69] These other factors are circumstances that aggravate the offense of unauthorized absence, including the cause of the accused's absence—neglect or design.

Several cases involving these same offenses followed *Posnick* without much discussion by the Court.[70] However, in a subsequent case involving absence without leave and missing movement through design, the Court used the more persuasive argument that Congress intended that missing movement be an aggravated form of absence without leave. The fact that the movement was missed by design, rather than neglect, is an aggravating circumstance that may be considered in arriving at sentence.[71]

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[67] U.S. v. Posnick, 8 USCMA 201, 203, 24 CMR 11, 13 (1957).

[68] *Id.* at 203, 24 CMR at 13.

[69] For discussion of U.S. v. Posnick, 8 USCMA 201, 203, 24 CMR 11, 13 (1957), and opinion that holding may be detrimental to enforcement of discipline in the armed forces, see Note, 26 Geo. Wash. L. Rev. 348 (1958).

[70] See U.S. v. Woolley, 8 USCMA 655, 25 CMR 159 (1958); U.S. v. Henley, 8 USCMA 340, 24 CMR 150 (1957); U.S. v. Underwood, 8 USCMA 338, 24 CMR 148 (1957).

[71] U.S. v. Bridges, 9 USCMA 121, 25 CMR 383 (1958). The Court conceded there could be unauthorized absences that were outside the orbit of its statement in U.S. v. Posnick, 8 USCMA 201, 24 CMR 11, that every missing movement offense includes an unauthorized absence. However, the Government realized no comfort from this concession.

The problem of multiplicity seems to abound in conjunction with absence wihout leave, probably because it is so easy to charge and prove.[72] One of the cases cited most by the Court in determinng the separateness of absence without leave and other offenses is United States v. *Modesett,*[73] which involved charges of absence without leave and breach of restriction arising from the same act. The Court applied, with favor, the rule enunciated in Posnick, *supra,* that if the evidence sufficient to support a conviction on one charge will support a conviction on another charge, the two charges are not separate. It pointed out that when the Government, to show the circumstances surrounding the breach of restriction, relies upon proof of an unauthorized absence from the area of restriction, and that proof is by itself also sufficient to establish the unauthorized absence, the same evidence supports the conviction for both offenses. As a result such charges are not separate.

The foregoing principle has been applied to other cases of absence without leave and breach of restriction,[74] breach of parole,[75] and escape from confinement.[76]

There are, of course, occasions when an accused can absent himself from two different places by two separate acts and thereby commit two separate offenses. The Court recognized this in the Helfrick case,[77] where the accused was charged with two offenses of absence without leave and two of breach of restriction. The initial date and place of each unauthorized absence corresponded with the time and place of the breaches of restriction. The accused having pleaded guilty, no evidence was presented in the record of trial. However, the Court examined the accused's pretrial statement which indicated that the first absence and breach of restriction were separate. The Court reasoned that the same situation was possible in regard to the remaining charges and held against the accused on the issue of multiplicity. Simi-

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[72] **See par. 164*a*, MCM, 1951, p. 313.**

[73] **9 USCMA 152, 25 CMR 414 (1958).**

[74] **U.S. v. Moore, 9 USCMA 722, 26 CMR 502 (1958), where Government conceded U S. v. Modesett, 9 USCMA 152, 25 CMR 414, was dispositive of multiplicity issue; U.S. v. Holland, 9 USCMA 323, 26 CMR 103 (1958); U.S. v. Welch, 9 USCMA 255, 26 CMR 35 (1958); U.S. v. Lowe, 9 USCMA 215, 25 CMR 477 (1958).**

[75] **U.S. v. Taglione, 9 USCMA 214, 25 CMR 476 (1958).**

[76] **U.S. v. Green, 9 USCMA 585, 26 CMR 365 (1958); U.S. v. Phillips, 9 USCMA 323, 26 CMR 103 (1958); U.S. v. Teitsort, 9 USCMA 322, 26 CMR 102 (1958); U.S. v. Kittle, 9 USCMA 321, 26 CMR 101 (1958); U.S. v. Welch, 9 USCMA 255, 26 CMR 35 (1958).**

[77] **U.S. v. Helfrick, 9 USCMA 221, 25 CMR 483 (1958).**

larly, in the subsequent case of *United States* v. *Williams*,[78] where the specifications alleged the accused's unauthorized absence from his place of duty, the "Naval Receiving Station" of the Naval Station at San Deigo, and also his breach of arrest from the "Naval Station," the Court found no multiplicity. It said that although both offenses were alleged to have occured on the same day, the accused's unauthorized absence from his place of duty did not necessarily prove his departure from the place of arrest. While these two cases are not inconsistent with its former holdings, it does indicate the Court might not now be looking so hard to find multiplicity.

2. *Lesser Offense — Greater Punishment*

A unique problem is brought to light by the Court's application of its lesser included offense principles in solving multiplicity questions. As applied by the Court, it is possible for a lesser included offense to have a greater punishment than its principal offense.

Such a case was the *Morgan* case.[79] Morgan was convicted of several offenses, among which were assault with intent to commit sodomy and sodomy. Both offenses were committed upon the same person, at the same time and as part of the same transaction. As indicated by the allegation of assault, the sodomy was a nonconsensual one. Chief Judge Quinn, speaking for the Court, divided as usual on multiplicity questions, analogized the force aspect of sodomy to the offense of rape. In rape, he said, the force that constitutes the assault is also the force that shows the victim's lack of consent. "So, too, if sodomy is accomplished by force, the force is an inseparable part of the single act which the accused intended to commit."[80] The Court rejected as unrealistic the Government's contention that the aggravated assault required proof of a specific intent while the completed act of sodomy did not. It said that in either offense the intent of the actor was to accomplish the unnatural union. So the assault did not require proof of an intent different from that present in the completed offense. The Court concluded that Article 125 included consensual and nonconsensual sodomy and that where the latter variety is shown to exist assault is an essential element. It dismissed as "anomalous" the fact that the authorized punishment

[78] 9 USCMA 400, 26 CMR 180 (1958).

[79] U.S. v. Morgan, 8 USCMA 341, 24 CMR 151 (1957); *accord*, U.S. v. Williams, 9 USCMA 55, 25 CMR 317 (1938).

[80] *Id.* at 343, 24 CMR at 153.

for the lesser offense of assault with intent to commit sodomy was ten years, while that for sodomy was only five years.[81]

Judge Latimer vigorously opposed the Court's reasoning. He considered the two offenses to be separate because the assault with intent to commit sodomy requires an element which sodomy does not—an assault—while sodomy requires penetration, which the other offense does not.

Considered in this light, the *Morgan* case appears to constitute a departure from both *Blockburger* and **McVey.** However, probably if it were not for the discrepancy between the punishment for the lesser and principal offense, *Morgan* would not be so noticeable. If the Court continues to adhere to its position in the *Morgan* case, it would seem appropriate for the Table of Maximum Punishments, in the *Manual,* to be amended to conform therewith. A possible solution would be to divide the punishment under Article 125 to provide for a higher maximum punishment for cases of nonconsensual sodomy.

C. One Act— One Punishment

A series of cases has appeared in which the Court has dealt with the problem of multiplicity not so much from the lesser included offense standpoint as by stressing the view that when the accused committed only one act he should not be punished twice. In *United States* v. *Brown,*[82] the accused left his Air Force parka with a "lady of pleasure'' as security for payment for the services she had rendered. He was to redeem the parka in about a week. Several months later when attempting to redeem it so that it could be turned in to supply, he found it had been sold. Ultimately he was charged with wrongfully disposing of the parka, military property of the United States, and also larceny of the parka. The Court held the two charges to be multiplicious and said the differences in the proof required for the two offenses were illusory when there was but one act by the accused. "We are persuaded then that when a single act violates both Articles, it was not intended that the offender be subjected to two punishments."[83] Judge Latimer of course dissented, stating that the Manual rule was not rendered inapplicable because a single act established both offenses.

The Court's language in the *Brown* case could be construed as a partial return, at least, to the "most important aspect'' rule of

[81] Par. 127*c*, **MCM, 1951.**

[82] **8 USCMA 18, 23** CMR **242 (1957).**

[83] *Id.* **at 20, 23 CMR at 244.**

the earlier *Manuals.* However, in the subsequent cases in which the Court cited *Brown,* this construction was not as explicit. Rather, the argument most noticeably advanced was that offenses were not separate when committed by a single act and proof of one was sufficient to establish the other. Thus, a charge under Article 121, alleging larceny of the contents of letters, and another charge under Article 134, alleging larceny of the letters as mail matter, were held not separate.[84] One fraudulent claim cannot be made into separate offenses by charging violations of different subsections as the acts involved in the transaction are not separate. They merge into one step.[85] Also, larceny of money and presenting a false claim for the same amount, on the same day, at the same place and to the same victim are not separate offenses.[86]

Very recently, the Court declined to extend the scope of the *Brown* case. This disinclination was expressed in the case of *United States* v. *McClary.*[87] McClary had been convicted of stealing paint belonging to the United States on November 5, 1957, and two days later selling this same paint. In addition, he was convicted of similar transactions involving the stealing of glass substitute on December 6, 1957, and the sale of this same Government property on December 7, 1957. The board of review, relying on the *Brown* case, held that each larceny and the subsequent disposition of the same property were a single transaction since the thefts were committed for the purpose of making wrongful sales. The Acting Judge Advocate General of the Army certified the record of trial to the Court to determine the correctness of the board of review's holding.

The Court believed "the board broadened the intended scope of our holding in that case."[88] Distinguishing *Brown* as a peculiar case on its facts, the Court said in the case at bar there was a positive violation of two distinct Congressional statutes, and there was no compelling reason to say that fairness to the accused required the punishment to be limited to one. Before concluding that the offenses were clearly and distinctly separate, Judge Latimer, speaking for a majority of the Court said:

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[84] **U.S. v. Dicario, 8 USCMA 353, 24 CMR 163 (1957); cf. U.S. v. Renton, 8 USCMA 697, 25 CMR 201 (1958); U.S. v. Crusoe, 3 USCMA 793, 14 CMR 211 (1964). But cf. U.S. v. Real, 8 USCMA 644, 25 CMR 148 (1958).**

[85] **U.S. v. Rosen, 9 USCMA 175, 5 CMR 437 (1958); *accord,* U.S. v. Lemieux, 10 USCMA 10, 27 CMR 84 (1958).**

[86] **U.S. v. Reams, 9 USCMA 696, 26 CMR 476 (1958).**

[87] **U.S. v. McClary, 10 USCMA 147, 27 CMR 221 (1959).**

[88] ***Id.* at 151, 27 CMR at 225.**

"The crime of selling Government property is complete without regard to the manner in which possession is obtained, and the offense of stealing is committed regardless of the manner in which the thief later deals with the property, pretermitting an intent to return at the time of property. And sale of Government property does not require proof of wrongful taking which is not necessary in the sale of Government property. And sale of Government property does not require proof of wrongful taking.""

D. *Current Trend*

It is necessary to go back to a case decided in 1957, which did not concern multiplicity as such, to evaluate properly some of the Court's most recent decisions involving multiplicity to ascertain what may be a shift in the Court's thinking. In that case, *United States* v. *Boswell*,[90] the charge was desertion but it became necessary because of the peculiar findings returned by the court-martial for the Court of Military Appeals to determine whether escape from confinement was an offense lesser included within desertion. The Court held it was not, for the following reasons. To prove an escape, it must be shown the accused was placed in lawful confinement. While such evidence of escape bears upon the accused's intent to absent himself or remain away without authority, it is not an integral part of the general proof required for desertion. "Hence, neither from the standpoint of allegation nor from the standpoint of proof,"[91] was escape from confinement a lesser offense included within the desertion charge.

The Court did not discuss the fact that the evidence in the case showing the accused's initial absence, which formed the basis for the desertion charge, also showed the escape from confinement. Nor was it much concerned that the accused's escape was a material fact in providing the accused's intent to desert and that his intent was shown in part by his escape from confinement, as "it is not an integral part of the general proof required for desertion."[92]

One case such as this certainly is no trend. It could not affect the well entrenched rule of lesser included offenses announced in the *Davis* case. However, other cases followed where the issue was specifically raised as to the multiplicious nature of charges alleging desertion and escape from confinement) when both charges arose from the one act of the accused.[93]

[89] Id. at 152, 27 CMR at 226.

[90] 8 USCMA 145, 23 CMR 369 (1957).

[91] Id. at 148, 23 CMR at 372.

[92] *Ibid.* cf. U.S. v. Redenius, 4 USCMA 161,166, 15 CMR 161, 166 (1954).

[93] U.S. v. Haliburton, 9 USCMA 694, 26 CMR 474 (1958) ; U.S. v. White, 9 USCMA 692, 26 CMR 472 (1958).

In the *Haliburton* case, decided October 3, 1958, it was stated that, in light of *Posnick, supra,* and *Modesett, supra,* "the prevailing rule" of the Court was that offenses arising out of the same transaction are not separate for punishment purposes if the proof sufficient for one offense will also prove the other.[94]. In *Haliburton* it was held that desertion and escape from confinement were separate and in no way multiplicious. The Court went on to say that proof of desertion was not sufficient to prove the elements of escape. It said :

> "Desertion can be, and frequently is, from a place other than one of confinement. On the other hand, proof of escape does not prove the specific intent requisite for desertion. This intent to remain away permanently need not even be formed in the mind of the accused at the moment of departure or escape.""

Judge Latimer, speaking for a unanimous court, distinguished the Court's holding of multiplicity in cases involving absence without leave and escape from confinement, where the evidence of escape proved the unauthorized absence, on the ground of the specific intent necessary for desertion.

Although the Court approached the problem reciting the *Posnick* rule, actually it appeared to be saying that each offense required different elements of proof and therefore the offenses were separate.

On the same day that *Haliburton* was decided, the Court also decided *United States* v. *Granger.*[96] There, it was held charges of failure to obey an order to report and absence without leave were multiplicious ;[97] charges of desertion and breach of restriction, desertion and escape from custody, desertion and escape from confinement were not multiplicious.

Four days later the decision in *United States* v. *Morse* was rendered.[98] Morse was a guard in an area where an ice-cream vending machine had been broken into on two occasions. Because of these prior break-ins, the money changer and some coins were coated with a fluorescent paste and a powder that leaves a blue stain upon contact. When the machine was again rifled and traces

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[94] U.S. v. Haliburton, 9 USCMA 694, 695, 26 CMR 474, 475 (1958).

[95] *Ibid.*

[96] 9 USCMA 719, 26 CMR 499 (1958).

[97] Overruling U.S. v. Larney, 2 USCMA 563, 10 CMR 61 (1953), *supra,* fn. 50.

[98] 9 USCMA 799, 26 CMR 67 (1958). Compare U.S. v. Gibson, 3 USCMA 746, 14 CMR 164 (1954), where the Court, considering charges against a guard who had broken into three buildings and rifled coin boxes of vending machines therein, said better examples of separate offenses could hardly be imagined.

of fluorescent paste found on his gloves and blue powder seen on his hand, Morse, after his confession, was charged with and convicted of a number of offenses. The three specifications of Charge I alleged dereliction of duty by breaking into the vending machine on three separate occasions and stealing coins therefrom. Three of the specifications of Charge II alleged wrongful damage to the vending machine by prying it open with an iron bar on the same dates as the dereliction offenses. Three of the specifications of Charge III alleged larceny of the coins from the machine, two of which corresponded in date with the incidents alleged in Charges I and II. In addition, another specification of Charge II alleged damage to the machine and one under Charge III alleged larceny of coins on the same date. The accused contended the charges, except four counts of larceny and one of damage to property, were multiplicious.

As to the dereliction of duty charges the Court agreed with the accused. It said the specifications alleged that each act of dereliction consisted of damage to, and theft from, the machine. These allegations made larceny and damage integral parts of the offenses charged. Therefore, the Court pointed out, the proof sufficient to establish the dereliction in each instance necessarily proves the other offenses.

The accused was not as fortunate as to the remaining specifications. The Court stated:

> "The evidence sufficient to support the findings of larceny from the machine does not also show the nature and extent of the damage . . . . And, conversely, proof of damage to the machine does not establish that the money was taken from it."[99]

Consequently, these offenses were held to be separate and distinct.

The Court's reasoning as to the dereliction offenses obviously followed *Posnick* and ***Modesett*** as proof of the derelictions charged would prove the other offenses of larceny and damage. But on this same standard would not the proof sufficient to prove larceny also prove the damage to the machine? The Court said this evidence did not come within its prevailing rule because it did not also show the "nature and extent" of the damage. Had the Court wanted to extend Posnick and Modesett to the larceny and damage offenses could it have done so? Surely evidence sufficient to establish the larceny of coins that had been rifled from a coin vending machine by prying it open with an iron bar would be sufficient to establish the damage to that same vending machine. To show the manner in which the coins were taken the

[99] *Id.* at 803, 27 CMR at 71.

prosecution would have to show the nature of the damage and at least some of the extent of damage. In this regard, the extent of the damage is important not so much as an element but as an aggravating circumstance in furnishing a basis for additional punishment.[100]

So, as in *Haliburton* and *Granger*, it seems the Court did not choose to extend its "prevailing rule," that is, offenses arising out of the same transaction are not separate for punishment purposes if the proof sufficient for one offense will also prove the other, as far as it might have been expected.[101]

In the *Beene* case it stated it had rejected the interpretation that offenses were separate "if offenses alleged may — theoretically and conceivably — be established by evidence not the same. . . ."[102] In these last decisions the Court appears to be finding that separate offenses are established by evidence theoretically and conceivably not the same.

VI. THE EFFECT OF MULTIPLICIOUS CHARGES

A. *Limitations on Punishment*

The *Manual* authorizes punishment to be imposed upon an accused only for separate offenses arising out of the same act or The Court of Military Appeals when first considering the question, and on many other occasions, stated that the only prohibition against multiplicity contained in the *Manual* is that the maximum sentence may be adjudged only for separate offenses.[104] It has recognized that paragraph 74*b*(4) of the *Manual* is direct authority for the validity of findings of guilty under each of two or more specifications, although they are admittedly but different ways of alleging the same offense.[105] As Judge Latimer put it:

> "This permits a convening authority to frame the specifications in such a way that an unexpected turn in the evidence will not result in a fatal variance nor in the necessity of disapproving a finding solely

[100] See U.S. v. Beene, 4 USCMA 177, 182, 15 CMR 177,182 (1954).

[101] See U.S. v. Blair, 10 USCMA 161, 27 CMR 235 (1959), where offenses of wrongfully using marihuana and unlawfully transferring marihuana were held to be separately punishable. The transfer consisted of the accused and other persons passing marihuana cigarette back and forth while they smoked it.

[102] *Id.* at 178, 15 CMR at 178.

[103] Par. 76*a*(8), MCM, 1951.

[104] *E.g.*, U.S. v. Yarborough, 1 USCMA 678, 5 CMR 106 (1952); U.S. v. Dandaneau, 5 USCMA 462, 18 CMR 86 (1955).

[105] *E.g.*, U.S. v. Johnson, 5 USCMA 297, 17 CMR 297 (1954).

because the facts found fail to prove the offense in the particular manner alleged."[106]

Such broad language should not, however, be taken to mean that charges can be preferred without discrimination where several offenses arise out of the same transaction. Some reservation by the Court, although not defined, is indicated. Use of such phrases as "no error would *necessarily* result from charging and convicting the accused of offenses arising out of the same transaction"[107] and "under *ordinary* circumtances, the question of multiplicity affects only the sentence"[108] indicates the Court would at least look with disfavor upon an unreasonable multiplication of charges.

Some limitations as to what is considered unreasonable have been established. The Government will not be permitted to allege lesser included or separate offenses arising out of the same transaction when they are not shown to serve any purpose other than to be the base for admitting otherwise inadmissible testimony.[109] Nor can unwarranted charges be preferred and used to force the accussed to offer a guilty plea to some charges in exchange for dismissal of the others.[110]

The issue of multiplicity, and requested instructions in regard to the maximum authorized instructions, should be presented by the defense counsel to the law officer to insure proper determination of the issue at that level.[111] When the law officer finds that multiplicity is present and it has been made to appear "through semantical manipulation" that the accused has committed more offenses than he actually has, the burden then falls upon the law officer.[112] He must then instruct in open court that the maximum sentence imposable is different from the apparent total imposable because of the effect of multiplicity on sentence

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[106] *Id.* at **299, 17** CMR at **299** ; *accord,* par. 26*b,* MCM, **1951.**

[107] U.S. v. Soukup, **2** USCMA **141, 145, 7** CMR **17, 21 (1953).** (Emphasis added.)

[108] U.S. v. Bell, 8 USCMA **193, 195, 24** CMR **3, 5 (1957).** (Emphasis added.)

[109] U.S. v. Warren, 6 USCMA **419, 423, 20** CMR **135, 139 (1956)** (opinion of Latimer, J.). Quinn, C. J., concurring in the result of this case, disassociated himself from this opinion. He said heretofore accusers have been free to allege an offense in as many ways as they deemed advisable, and convening authorities were similarly at liberty to refer such charges for trial. Although not opposed to reviewing charges upon the basis of an abuse of discretion, Quinn, C. J., did not think this was a proper case for such review.

[110] See U.S. v. Wille, **9** USCMA **623, 26** CMR **403 (1958).**

[111] See U.S. v. Christensen, **4** USCMA **22, 15** CMR **22 (1954)** ; U.S. v. Bell, 8 USCMA **193, 24** CMR **3 (1957).**

[112] U.S. v. Posnick, 8 USCMA 201, 205, 24 CMR 11, 15 **(1957)**

consideration.[113] In such cases the maximum sentence imposable is limited to the most serious of these offenses, that is, the one that carries the greater punishment.[114]

B. *Subsequent Reassessment of Sentence*

Suppose a case where multiplicity is present but the law officer fails to take proper action with regard to the sentence. Such error can be purged by any reviewing authority, with requisite power, redetermining the appropriateness of the sentence in the light of that error.[115] If the error is brought to light in the staff judge advocate's review to the convening authority and the appropriateness of the sentence determined,[116] or the board of review re-evaluates the sentence with full knowledge of the problem, further consideration by the Court of Military Appeals is neither necessary or required.[117]

Before the Court of Military Appeals this issue may be raised by appellate defense counsel even if not noted in the proceedings below.[118] If the Court finds multiplicity and the reviewing, that is, sentencing, authorities have not considered the sentence on that basis, the record of trial usually is returned for reconsideration of the sentence.[119] In such cases the Court usually returns the record to the appropriate Judge Advocate General for resubmission to the board of review so that the board of review can reassess the sentence.[120] However, in one case a rehearing on the sentence was directed.[121]

The accused receives the benefit of the doubt as to whether his sentence was affected by the multiplicious charges.[122] If there is a "fair risk"[123] that the accused's sentence was greater because he was convicted of two offenses instead of one, the record of trial will be returned even if the maximum sentence was not adjudged.[124]

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[113] *Ibid.* See U.S. v. Thorpe, 9 USCMA 705, 26 CMR 485 (1958).

[114] U.S. v. Modesett, 9 USCMA 152, 25 CMR 414 (1958); U.S. v. Williams, 9 USCMA 55, 25 CMR 317 (1958); U.S. v. Morgan, 8 USCMA 341, 24 CMR 151 (1957).

[115] U.S. v. Crusoe, 3 USCMA 793, 14 CMR 11 (1954).

[116] U.S. v. Rock, 9 USCMA 503, 26 CMR 283 (1958).

[117] U.S. v. Bell, 8 USCMA 193, 24 CMR 3 (1957).

[118] U.S. v. Lowe, 9 USCMA 215, 25 CMR 477 (1958).

[119] See U.S. v. Welch, 9 USCMA 255, 26 CMR 35 (1958).

[120] *E.g.*, U.S. v. Modesett, 9 USCMA 152, 25 CMR 414 (1958).

[121] U.S. v. Posnick, 8 USCMA 201, 24 CMR 11 (1957).

[122] U.S. v. Modesett, 9 USCMA 125, 25 CMR 414 (1958).

[123] U.S. v. McVey, 4 USCMA 167, 15 CMR 167 (1954).

[124] U.S. v. Cooper, 2 USCMA 333, 8 CMR 133 (1953); U.S. v. Morse, 9 USCMA 799, 27 CMR 67 (1958), Latimer, J., dissenting on the ground that Article 59, UCMJ, applies to sentences as well as findings.

Occasionally, even though the sentence is based on multiplicious charges without proper limiting instructions, the case will not be remanded. As, for example, when the difference in the maximum punishment is very slight,[125] or the accused's sentence, when charged with a number of serious offenses, is lenient when compared to the legal maximum authorized.[126]

C. *Dismissal of Multiplicious Charges*

In the great majority of cases in which it has considered the effect of multiplicious charges, the Court of Military Appeals has held that the error relates only to the sentence.[127] In no case has the Court set aside a valid finding of guilty solely because the specifications upon which it was based was multiplicious.[128] But how about the law officer at the trial? Does he have authority to dismiss a charge he determines to be multiplicious? If he does dismiss such a charge, what is the effect of this action? Can a board of review dismiss an otherwise valid charge because of multiplicity?

At the outset it is apparent that consideration must be given to paragraphs *26b* and *74b(4)*, of the *Manual.* Paragraph *26b* cautions against using one transaction as a basis for an unreasonable multiplication but recognizes that, at times, sufficient doubt as to the law or facts may exist to warrant making one transaction the basis for charging two or more offenses. On the other hand, paragraph *74b(4)* permits an accused to be found guilty of two or more offenses arising out of the same transaction, regardless of whether the offenses are separate.

The Court has considered giving the accused relief by dismissing the multiplicious offenses rather than by causing a reconsideration of the sentence.[129] The first case where such relief had been given was the *Strand* case which involved the accused's efforts to avoid the consequences of a "weekend marriage" by sending his wife a false communication regarding his death. Be-

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[125] See U.S. v. Holland, 9 USCMA 329, 26 CMR 103 (1958) (six months); U.S. v. Helfrick, 9 USCMA 221, 25 CMR 483 (1958) (one month).

[126] U.S. v. Reams, 9 USCMA 696, 26 CMR 476 (1958), Ferguson, J., dissenting on the ground that the law officer's instructional error exceeded by ten years the maximum confinement imposable.

[127] U.S. v. McCormick, 3 USCMA 361, 12 CMR 117 (1953).

[128] U.S. v. Drexler, 9 USCMA 405, 412, 26 CMR 185, 192 (1958) (dissenting opinion of Latimer, J.).

[129] U.S. v. Drexler, 9 USCMA 405, 26 CMR 185 (1958); U.S. v. Strand, 6 USCMA 297, 20 CMR 13 (1955); U.S. v. Crusoe, 3 USCMA 793, 14 CMR 211 (1954).

fore arraignment, defense counsel moved to dismiss, as multiplicious, the specifications of the Additional Charge. The law officer reserved his decision until the court-martial returned findings of guilty on all charges. Before it closed to deliberate on the sentence, the law officer ruled that Specification 2 of the Additional Charge was a lesser included offense to Specification 1 and ordered it dismissed. In addition, he instructed the court not to consider the dismissed specification in fixing a sentence.

The Court approved the law officer's actions. From a consideration of the holding in this factual situation, the following conclusions of the Court emerge. If an accused believes charges are multiplicious, he should move to dismiss one or more of them. A motion to dismiss a specification on the ground of multiplicity usually presents a question of law which is interlocultory in nature. The law officer can rule finally on such a motion. If he desires to change a ruling at any time during the trial, he may. This power to change includes the power to reserve decision. In case of doubt the law officer should reserve decision on the motion until the facts are developed and he can better evaluate their legal effect.

In *United States* v. *Drexler*,[130] where a Navy board of review dismissed a multiplicious charge and reassessed sentence, the Court further expressed itself regarding the power to dismiss a multiplicious specification, particularly with respect to a board of review. There Chief Judge Quinn, speaking for a majority of the Court stated that a board of review, possessing the powers of an appellate tribunal, can in the interest of justice and in its sound discretion, dismiss a multiplicious charge. Further, that the form of the charges need not be corrected by dismissing the multiplicious charge and ordinarily, a reconsideration of the sentence is directed.

In its opinion the Court gave some help to law officers, as to when a charge should be dismissed, by stating "when it is manifest that the charge is identical to another, a motion to dismiss one or the other is proper."[131]

Judge Latimer dissented from the majority of the Court. He believed that on many prior occasions the Court had fixed with certainty the rule that multiplicity applies only to sentence unless in originally pleading the offenses there was an unnecessary multiplication. He stated that "unreasonableness" must be tested in relation to conditions as they exist at the time the charges are

[130] **U.S. v. Drexler, 9 USCMA 405, 26 CMR 185 (1958).**

[131] U.S. v. **Drexler, *supra,*** fn. **128,** at **408, 26 CMR** at **188.**

prepared. And in this case, involving desertion and missing movement, he did not think it was unreasonable to plead two offenses to cover the contingencies of proof. He considered the board of review's action was based on its belief of the unfairness of the present law rather than the fact that error was committed.

In view of the language in both *Drexler* and *Strand* defense counsel, at both the trial and appellate stage, can be expected to probe further into this aspect of the Court's disposition of multiplicious offenses, to see if this is the limit to which the Court will go.

In the several cases involving multiplicity which have been decided after ***Drexler,*** the Court, having opportunity to do so, has made no mention of dismissal of the offending specifications.[132] Rather, the findings of guilty were affirmed and any correction necessary was done by causing a reconsideration of the sentence.

Considering paragraph *26b* of the Manual, which specifically provides for charging several offenses where doubt as to facts or law exists, it would seem that the Court should use some caution in saying that when it is manifest that one charge is identical to another, a motion to dismiss is proper. If the Court continues to use this language, then to give effect properly to paragraph *26b* in its entirety, the Court should follow Judge Latimer's suggestion. That is, the test for "unreasonableness" should be determined in relation to conditions as they exist at the time the charges are prepared. Thus, only if it was "manifest" at that time that one charge was identical to another would a motion to dismiss be proper.[133] This would give effect to the admonition in paragraph *26b* not to unreasonably multiply charges and also would recognize the right given therein to the pleader to charge more than one offense when warranted by doubt as to the law or facts. An obvious example of "unreasonableness" at the time the charges are prepared would be where a charge of desertion and one alleging absence without leave, covering the same period and absence, were preferred by the accuser.

In addition to determining if and when a multiplicious charge should be dismissed, other problems could confront a law officer if a multiplicious charge is dismissed. Suppose the following case. An accused, prior to arraignment, moves to dismiss one of the charges against him on the ground that it is multiplicious. The

[132] *E.g.,* U.S. v. Morse, 9 USCMA 799, 27 CMR 67 (1958); U.S. v. Reams, 9 USCMA 696, 26 CMR 476 (1958).

[133] See U.S. v. Crusoe, 3 USCMA 793, 796, **14** CMR 211, 214 (1954).

law officer concurs and orders the specification dismissed. Upon trial for the remaining charge, the accused is acquitted. After trial, the dismissed charge is preferred again and the accused brought a trial thereon. How should the law officer at this second trial rule with respect to the accused's motion to dismiss on the ground of former jeopardy? Does the dismissal of a multiplicious charge bar trial for that offense after acquittal for the non-multiplicious charge?

Both the Code and the Manual state that no person shall be tried a second time for the same offense without his consent.[134] The law officer, in such a case, must find out why the multiplicious charge was dismissed in the earlier trial. Was it a lesser included offense? Under the facts of that case, was it the same offense as the charge upon which acquitted, but was alleged as another offense? To make a proper determination as to the effect of the dismissal, at least the previous record of trial should be introduced. If it can be ascertained that the charge upon which the accused is now being tried is a lesser included offense of the offense for which previously acquitted, the answer is clear. The accused when tried for an offense in the sense of Article 44 of the Code cannot, without his consent, be tried for an offense necessarily included therein.

The determination of whether the particular offense is included within the charge of which the accused was acquitted may not be easy. As previously noted the Court of Military Appeals modified the Manual rule on determining lesser included offenses. It applies a liberal standard and tests the facts stated and proved in support of the principal offense to determine whether lesser included offenses are comprehended therein.[135] Accordingly, the law officer must also use the liberal standard. Similarly, the broader the test of included offenses, the broader should be the test of inclusion when the accused pleads former jeopardy to a subsequent prosecution.[136]

Recent cases decided by the Supreme Court have interpreted strictly the protection afforded an accused against former jeopard~.'~Nevertheless, it is submitted that the Court of Military

[134] UCMJ, Art. 44(a); par. 68d, MCM, 1951.

[135] U.S. v. Hobbs, 7 USCMA 693, 23 CMR 157 (1957).

[136] 45 Calif. L. Rev. 534 (1957).

'''See Ciucci v. Illinois, 356 U.S. 571 (1958), holding that the defendant's two former trials for the murders of A and B is no bar to his trial for the murder of C, all of whom were killed during the same incident. Evidence of deaths of A, B, C, and D were introduced at each trial. Hoag v. New Jersey, 356 U.S. 464 (1958). But quaere if prosecutor has evil motives?

Appeals will, as it has in determining the existence of lesser included offenses, adopt a liberal standard in deciding, for purposes of former jeopardy, whether an accused is being tried for a lesser include offense.

Whether the offense in question is a lesser included offense is not the only thing for which the law officer must be alert. For instance, a situation might arise as in *United States* v. *Rosen*, where the accused's acts in committing larceny and also violating different subsections of Article 132 of the Code were held by the Court not to be separate steps in the same transaction but to "merge" into one step.[138] If the Court thought such a merger took place, it is likely it would think that a subsequent trial for one of these violations, which had been dismissed before the accused's acquittal on the rest of them, would be violative of the former jeopardy provisions. If all the alleged acts merge into one step, acquittal of the "step" should bar a trial for one of the acts which would have made part of the step, had it not been dismissed.

If the offense in question is not a lesser included offense of the offense for which tried or has not merged therein, former jeopardy will not have attached, even though both crimes arise out of the same transaction. In such case the elements of each are so different from each other that the law permits punishing both without violating the privilege against being twice placed in jeopardy for the same offense.[139]

Throughout its decisions on multiplicity, the Court has emphasized its concern that an accused might be punished twice for the same offense. It can be argued that where the accused has been acquitted in a prior trial for offenses arising out of the same transaction, he would not be punished twice even if tried again for another offense which also arose from that same transaction. The danger of double punishment would not exist because the accused had not yet been punished. In such instance would the Court apply a less liberal rule for former jeopardy purposes than it has in determining multiplicious offenses?

In a situation where the accused was being tried on a specification previously dismissed as multiplicious, it could be argued that the Court, by a little judicial legislation, might apply a different rule as to former jeopardy issues, when related to multiplicious offenses. The rule could be that the punishment for the second

[138] **9 USCMA 175, 25 CMR 437 (1958).**

[139] See **U.S. v. Calhoun, 5 USCMA 428, 18 CMR 52 (1955), which follows the rule of Gavieres v. U.S., 220 U.S. 338 (1911).**

trial not exceed that which could have been imposed had the multiplicious offenses been tried in one trial, and could not exceed the maximum provided for the offense for which tried at the second trial.

It does not appear likely that the Court would do this. The Court has been noted for endeavoring whenever possible to give every consideration to the accused. Actually, the prohibition against former jeopardy is not against being punished twice but against being tried twice.[140] In any close question pertaining to former jeopardy involving the welfare of an accused, undoubtedly the Court would apply a liberal interpretation to such a vital safeguard rather than ·· a narrow, grudging application."[141]

VII. CONCLUSIONS

The problem of multiplicity has two facets: "unreasonable" multiplication and separateness of offenses for punishment purposes.

Probably very little would have been heard of "unreasonable" multiplication of charges had accusers, judge advocates and convening authorities used some discretion in the number of charges, arising from one transaction, that were sent to trial. If charges were examined more carefully prior to referral for trial with a view toward sending to the court-martial only the strongest and most specific charge for the wrong done, only a rare case would the cry of "unreasonable" multiplication be heard. This procedure would have more advantages than disadvantages. Aside from eliminating the litigation of multiplicious pleading and the resultant delay and expense for review thereof by appellate tribunals, the Government would experience no material change in the sentence adjudged if the accused were found guilty. Rarely does a court-martial return the maximum sentence imposable for all offenses alleged. Courts-martial, when considering specifications arising out of one transaction, adjust their sentences accordingly and usually limit punishment to the accused's dereliction in its most important aspect.[142] Also, "if only for tactical reasons, an accuser will not want to give the impression that he wishes to persecute, not prosecute, the offender."[143]

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[140] U.S. v. Ball, 163 **U.S.** 662 (1896); see Slovenko, The Law on Double Jeopardy, **30** Tul. L. Rev. 409,414 (1956).

[141] See Green v. U.S., 355 U.S. 184 (1957).

[142] U.S. v. Johnson, 5 USCMA 297, 300, 17 CMR 297, 300 (1954) (opinion of Latimer, J.); Guy, Multiplicity, JAG J., Jul 1955, p. 21.

[143] Everett, Military Justice in the Armed Forces of the United States, 141 (1956).

This should not be construed as minimizing the necessity and utility in some instances of following the procedure authorized in the *Manual* to charge more than one offense when warranted by doubt as to the facts or the law. Judge Latimer has suggested that the test to determine unreasonableness in pleading must be made in relation to conditions as they exist at the time the charges are prepared.[144] Possibly the test should be made as of the time the charges are referred for trial. Usually, investigation after the charges are preferred will reveal sufficient information so that it can be determined whether sufficient doubt still remains as to the facts or the law to warrant charging multiple offenses. If at that time, and after adequate investigation into the transaction, there is still doubt and the charges are referred for trial, it is not likely the Court of Military Appeals would consider them to be unreasonably multiplied.

The Court is primarily interested in fair play for the accused. It has recognized the "propensity of prosecutors to allege as many offenses as the transaction is capable of supporting."[145] It can be expected to strike down multiplicious pleading based on improper motives, and used as a vehicle to prejudice the accused.

Those concerned with the administration of military justice must of necessity be concerned with accurately determining when offenses are separate for punishment purposes. Those persons concerned with preferring and processing charges must realize that, in light of the Court's decisions, no longer can charges be made to appear separate by semantical manipulation, using different labels, or stressing the difference in the number of the articles of the Uniform Code allegedly violated. It must be remembered the prevailing rule of the Court is that offenses arising out of the same transaction are not separate for punishment purposes if the proof sufficient for one offense will also prove the other. Charges should be drawn accordingly.

Recognition of this rule will materially assist the law officer. It will reduce the instances in which he will have to consider multiplicious offenses either from the standpoint of a motion to dismiss or as a limitation on the maximum punishment. Observance of the rule may encourage the Court not to pursue further its indication in *Drexler* and *Strand* that multiplicious offenses may be dismissed, rather than merely limited as to punishment. The Court is apparently reluctant to come to such a determination, although having had ample opportunity to do so, possibly

[144] U.S. v. **Drexler,** 9 USCMA 405, 411, 26 CMR 185,191 (1958).

[145] U.S. v. Morgan, *8* USCMA **341, 24** CMR 151 (1957).

because the *Manual* drafters obviously did not intend that such action be taken. Nevertheless, the Court has shown on prior occasions that it is not afraid to overrule the *Manual's* intent, whether express or implied. If the Court's rule is adhered to in the preferring and processing of charges arising out of one transaction it will see that such action is not necessary.

VIII. RECOMMENDATIONS

The Supreme Court has not had much trouble in applying the Blockburger rule when determining the separateness of offenses arising out of one transaction. As previously noted, one of the principal reasons behind the armed forces' adoption of the Blockburger rule was that Federal courts could be looked to for precedent. However, the rule finally promulgated in the *Manual* was not the same as that announced in Blockburger and subsequently followed by the Supreme Court. The difference in the wording of the two rules is slight. But this difference may have resulted in the several varying rules utilized by the Court of Military Appeals since 1952 as contrasted to the one rule successfully applied since **1932** by the Supreme Court.

As stated in Blockburger, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional "fact" which the other does not.[146]

The Manual rule substituted "element" for "fact" when the multiplicity provisions of paragraph 76*a*(8) were drafted. Possibly this lack of preciseness has contributed to the difficulty experienced by the Court and by others in adhering to the intended rule. **As** said by the late Judge Brosman:

> "Unless we know fully what we mean and exactly what we are doing, the words [element and fact] should not be used interchangeably in this setting in my view. Certainly the term "element" should not be used in a generalized or in vacuo sense, but must always be related to the facts of the individual case."[147]

Using "facts" as the criteria, rather than "elements," will enable pleaders to distinguish with more preciseness the separateness of offenses. It will permit pleaders and the Court to rely on the Supreme Court and other Federal Courts for precedent, for they will be applying a standard identical in all respects with the Supreme Court's test.

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[146] **284** U.S. at **304.**

[147] U.S. v. Larney, **2** USCMA **563, 572,** 10 CMR **61,** 70 **(1953)**

It is recommended that this rule be affected by a statutory amendment to the Code to provide for its inclusion. An appropriate place for this to be set forth would appear to be in Article *79*.

As amended Article *79* could read:

"ART. 79. Lesser included and separate offenses.

(a) An accused may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or of an offense necessarily included therein.

(b) An accused may, by a single act or omission, violate more than one article under this code and may be convicted and sentenced under each article violated unless the offenses defined therein are identical. The offenses are not identical if each artical violated requires proof of an additional fact which the other does not."

Paragraph 76*a* (8) of the *Manual* should then read :

"(8) The maximum authorized punishment may be imposed for each of two or more separate offenses arising out of the same act or transaction. The test to be applied to determine whether the offenses of which the accused has been convicted are separate is this: The offenses are separate if each requires proof of an additional fact which the other does not. The test for the separateness of these offenses must not be applied in a generalized manner but must be related to the facts of the individual case. Thus, if the accused is convicted of escape from confinement (Art. 95) and desertion (Art. 85)—both offenses arising out of the same act or transaction—the court may legally adjudge the maximum punishment authorized for each offense because escape requires proof *of* a freeing from restraint, which desertion does not, and desertion requires proof of intent to remain permanently absent, which is a fact not required in proving escape. But, for example, if the accused is convicted of absence without leave (Art. 86) and breach of restriction (Art. 134)—arising from the same act—the offenses are not separate if the fact of unauthorized absence from the area of restriction is also sufficient to establish the absence without leave."

In view of its close relation to the question of separateness of offenses, it is also recommended that the part of the *Manual* which defines a lesser included offense should be amended. The second unnumbered paragraph under paragraph 158 of the *Manual* should read :

"An offense is lesser than and necessarily included in an offense charged if all the facts required to prove the lesser offense are necessary facts in proving the offense charged. An offense is not included within an offense charged if it requires proof of any fact not required in proving the offense charged or if it involves acts of which the accused was not apprised upon his arraignment. The question of inclusion of offenses should be determined in terms of the allegations and facts of the specific case. If proof of the offense charged in the specification requires the establishment of every fact necessary to prove another crime, and if every necessary fact of that other offense is alleged, the second

crime is necessarily included. A familiar instance of an included offense is absence without leave under a charge of desertion. Also, where an accused is charged with robbery by force and violence, and the use of a dangerous weapon constitutes the force and violence of the robbery charge, aggravated assault may be a lesser crime included within the robbery. But one charged with desertion may not be found guilty of breaking arrest as an included offense thereunder because proof of arrest, a necessary fact in proving breach of arrest, is not a fact required in proving desertion."

A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE

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Foreword

"The Survey of The Law — Military Justice: The United States Court of Military Appeals 29 November 1951 to 30 June 1958" appears in 3 Military Law Review 67–115, January 1959. It represents an effort by various officers of the Government Appellate Division, Office of The Judge Advocate General of the Army, to present a concise summary of the principles which evolved from decisions of the Court of Military Appeals during the titled period. The instant supplement to that article constitutes a revision on the basis of cases decided by the Court from the terminal date of the original article to 30 June 1959. However, Section VII, dealing with Sentence and Punishment, is new. Just as the original survey did not purport to cover every question considered by the highest military appellate tribunal, nor serve as a substitute for research, so the instant material merely analyzes the cases regarded as most significant in the several areas considered during the survey period.

The opinions, doctrines, and conclusions expressed herein are those of the authors and do not necessarily represent the opinions or doctrines of the Judge Advocate General's School, the Judge Advocate General's Corps, the Department of the Army or any other governmental agency.

I. PRETRIAL PROCEDURE: CHARGES AND SPECIFICATIONS: AND ARTICLE 31

During the survey period the Court of Military Appeals had occasion further to articulate the nature and requirements of the Article 32 Investigation. In *United States* v. *Samuels*[1] the Court

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[1] 10 USCMA 206, 27 CMR 280.

held that, while the Article 32 Investigation is an *ex parte* proceeding at which the Government is not a formal party, so that traditional evidentiary rules are relaxed, it is nevertheless judicial in character and is designed both to serve as a discovery procedure for the accused and to ascertain the probability of the truth of the charges. Accordingly, while statements of legitimately unavailable witnesses, to be admissible at the Article 32 hearing, need not qualify as depositions, it is error to admit them if they are neither sworn nor affirmed; and, charges predicated upon such evidence may be reversed where a timely objection has been voiced at the Article 32 hearing and made the basis for a motion for appropriate relief at trial.[2]

Regarding the unavailability of witnesses at the Article 32 proceeding, the Court of Military Appeals has issued a caveat that the circumstances of unavailability should be disclosed by the investigating officer.[3] It is clear, however, that a determination of unavailability will be honored on appeal unless appropriate relief was sought and erroneously denied at trial.[4]

Care must be taken by those charged with administering military justice at the trial level to avoid pretrial activities which might be said so to align such officials with the prosecution so as to impair or cast doubt upon their capacity impartially to perform the post-trial judicial functions required of them. Thus a convening authority who grants immunity to a prosecution witness,[5] and a staff judge advocate who promises to recommend clemency for one co-conspirator if he will be a prosecution witness in the trial of his accused confederate,[6] are disqualified to perform their respective post-trial functions in such cases. This disqualification, however, affects only the individual, and does not extend to the office, and absent a showing that the same individual undertook both the partisan and the judicial functions, there is no disqualification.7

Two cases concerning charges and specifications decided during the period under consideration warrant mention here. The amendment of a specification to a charge of wartime desertion so as to reflect the date and manner of termination is not the preferring of a new charge and does not destroy the efficacy of the

[2] *Ibid.*

[3] **Id. at 212.**

[4] **United States v. Farrison, 10 USCMA 220, 27 CMR 294.**

[5] **United States v. White and Sirpless, 10 USCMA 63, 27 CMR 137.**

[6] **United States v. Albright, 9 USCMA 628, 26 CMR 408.**

[7] **United States v. Gilliland, 10 USCMA 343, 27 CMR 417.**

original charge to toll the statute of limitations. Accordingly, the statute of limitations may not be invoked to bar trial upon the original charge as subsequently amended after the period of limitation.[8]

It is now settled in the military that larceny by check can be committed with a post-dated check, if the 'drawer intends that insufficient funds shall be on deposit for payment upon presentment. The fraud consists in the misrepresentation of an existing intention.[9]

In according its wonted attention to Article 31 issues, the Court of Military Appeals during the survey period enlarged the scope of the retributive consequences flowing from a violation of that Article, and also reemphasized the Article's general inapplicability to interrogators not subject to the Code. Thus, not only is a statement obtained without the requisite warning, and by promises of confidentiality, inadmissible against the declarant in a trial by court-martial, but evidence derived from the inadmissible statement is equally tainted.[10]

It is now settled that civilian law enforcement officers not subject to the Code and not acting as agents of the military — whether such officers be foreign,[11] local,[12] or federal[13]—are not required to provide the warning prescribed by Article 31. And voluntary statements obtained by such officers without a warning of rights are admissible before a court-martial, regardless of the admissibility under the law of the jurisdiction of which the investigator is an official.[14] Of course, the services cannot escape the requirements of Article 31 by having third parties act for them or on their behalf in crime detection work. However, where the Army does no more than furnish the Federal Bureau of Investigation information to aid in the identification, location and apprehension of a deserter suspect, FBI agents do not become agents of the military so as to require a warning of rights.[15]

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[8] United States v. Spann, 10 USCMA 410, 27 CMR 484.

[9] United States v. Cummins, 9 USCMA 669, 26 CMR 449.

[10] United States v. Haynes, 9 USCMA 792, 27 CMR 60. (This case overruled the dictum appearing in United States v. Fair, 2 USCMA 521, 10 CMR 19, indicating that real evidence derived from an inadmissible statement is admissible into evidence.)

[11] United States v. Girsham, 4 USCMA 694, 16 CMR 268 (an opinion of the late Judge Brosman, the principle of which survived the reconstitution of the Court and served as the basis for two decisions during the survey period).

[12] United States v. Dial, 9 USCMA 700, 26 CMR 480.

[13] United States v. Holder, 10 USCMA 448, 28 CMR 14.

[14] United States v. Dial, *supra.*

[15] United States v. Holder, *supra.*

11. COMMAND INFLUENCE AND JURISDICTION

A convening authority's expression of a verdict or sentence preference, and its impact upon the discretion of the court-martial, continue to receive the close attention of the Court of Military Appeals. Thus, where the court-martial is apprised, through the admission of a service record extract, of a commander's dissatisfaction with the omission of a punitive discharge from a sentence adjudged for the accused's former conviction for larceny, the court's inclusion of a bad conduct discharge in a sentence for escape from confinement is too suspect to permit affirmance.[1] An overseas commander's legitimate concern, however, over the incidence of rape by members of his command, even though this concern finds expression in remarks made to his staff in conference, does not constitute command control where the tenor of the remarks indicates that the commander, though abhorring the crimes, is not so "panicked by the civilian community's outrage" that a conviction or a particular punishment is sought or desired by him.[2]

Not only may direct influence by officials in a close command relationship to the members of the court constitute unlawful control, but policy pronouncements emanating from more remote levels of command, if brought to the attention of the court-martial, may have a similar effect. The policy announced, for example, in the Naval Supplement to the Manual, that confinement in excess of three months or a punitive discharge should be accompanied by reduction in grade, cannot lawfully be injected by the law officer into the sentence deliberations of the court-martial.[3] To be distinguished, however, are such innocuous departmental policies as that of the Navy requiring convening authorities in guilty plea cases to elaborate upon the circumstances of the offense for the benefit of appellate authorities.[4]

The Court considered a number of jurisdictional questions during the survey period. In two cases challenges to court-martial jurisdiction over persons not on active duty in the armed forces were rejected. Thus, discussing the significance of *Reid* v. *Covert*,[5] the Court held a civilian dependent accompanying the armed forces overseas subject to trial by court-martial for a non-capital

[1] United States v. Coffield, 10 USCMA 77, 27 CMR 151.
[2] United States v. Hurt, 9 USCMA 735, 761, 762, 27 CMR 151.
[3] United States v. Choate, 9 USCMA 680, 26 CMR 460.
[4] United States v. Webster, 9 USCMA 615, 26 CMR 395.
[5] 354 U.S. 1, 1 L ed. 2d 1148, 77 S. Ct. 1222 (1952).

offense.[6] And, in *United States* v. *Hooper,*[7] the accused challenged the jurisdiction of courts-martial to try retired officers in the absence of an order affecting their return to active duty. The Court, however, held that even absent such orders, an officer on the retired list of a regular component entitled to receive pay is part of the "land or naval forces" of the United States within the purview of the Fifth Amendment of the Constitution and is subject to court-martial jurisdiction under Article 2(4) of the Uniform Code of Military Justice. The Court pointed out that if orders affecting a retired officer's return to active duty were required to vest court-martial jurisdiction, Article 2(4) would be meaningless since the authority to hold trials by courts-martial could then be found in Article 2(1) of the Code.

In *United States* v. *Martin,*[8] a challenge to court-martial jurisdiction was based on the argument that the accused's induction into the Army was illegal since he attained only a score of nine on the Armed Forces Qualification Test at the time of his induction. Under the Universal Military Training Act of 1951 the passing requirement for the Armed Forces Qualification Test was to be fixed at a percentile score of 10. The Court concluded that notwithstanding that a person attains an AFQT score below ten he may properly be administratively determined to be acceptable for induction and accordingly lawfully inducted into the Army. The Court reasoned that the passing requirement for the Qualification Test appearing in the Universal Military Training Act was intended as a restriction on the services to prevent them from excluding certain persons from induction and does not operate as a limitation on the right of the armed forces to induct certain persons attaining lower scores. And in *United States* v. *Lopez,*[9] another challenge to jurisdiction on the basis of an allegedly illegal induction was rejected. There the accused, a Mexican national who entered the United States with his parents when he was two years old and who continuously resided in this country until his induction, sought to characterize himself as a "border crosser" and thus exempt from induction under the terms of an Executive Agreement between the United States and Mexico. Differentiating "border crossers" from "illegal entrants" on the ground that the former category clearly contemplates persons only temporarily in the United States, the Court found

[6] United States v. Dial, 9 USCMA 541, 26 CMR 321.
[7] 9 USCMA 637, 26 CMR 417.
[8] 9 USCMA 568, 26 CMR 348.
[9] 10 USCMA 334, 27 CMR 408.

the accused to fall into the latter classification and, as a resident, subject to induction into the armed forces.

During the survey period, the Court again had occasion to consider the status of a person who enters the military service prior to his seventeenth birthday. Reiterating the rule that a person below the age of seventeen is incapable of entering into an enlistment contract and that if enlistment is effected it is void and the enlistee not subject to trial by court-martial,[10] the Court announced that a change in the status of such a person remaining on active duty between his seventeenth and eighteenth birthdays on the basis of a "constructive enlistment" must be shown by the Government.[11] Another youthful soldier, a Reserve Forces Act (RFA) trainee, challenged the jurisdiction of a court-martial which tried him for the offense of escape from lawful confinement on the ground that the offense was committed and the trial held subsequent to the date provided for his release from active duty in the orders which ordered him to active duty. The accused argued that these orders were self-executing insofar as this termination date was concerned and that in the absence of amending orders court-martial jurisdiction terminated on the date provided for his release from active duty. Noting, however, that on that date the accused had "bad time" resulting from pretrial confinement to make good, the Court concluded that under such circumstances amending orders are not necessary to continue court-martial jurisdiction until such time as the requirements of the "bad time" statute have been fulfilled.[12]

In *United States* v. *French*,[13] the question faced by the Court was one of jurisdiction over an offense rather than jurisdiction over a person. As a result of his offer to sell various documents to agents of the Soviet Union, the accused was charged, *inter alia*, with wrongfully and unlawfully attempting to communicate information relating to the national defense of the United States to a foreign nation in violation of Article 134, Uniform Code of Military Justice. Concluding that this specification, although alleging the conduct in question to be of a nature to bring discredit upon the armed forces, in substance alleged a capital offense in violation of the Espionage Act, the Court held that subsection 2 of Article 134 could not be used to support court-martial jurisdiction. The Court reasoned that subsection 3 of

[10] See United States v. Blanton, 7 USCMA 664, 23 CMR 128.

[11] United States v. Overton, 9 USCMA 684, 26 CMR 464.

[12] United States v. Doherty, 10 USCMA 453, 28 CMR 19.

[13] 10 USCMA 171, 27 CMR 246.

that article indicates that Congress intended not to permit the prosecution of any capital offense in a military court under any guise except when specifically authorized by statutory enactments. Although no difficulty would have been encountered had this case arisen prior to **1954,** when a peace time violation of the Espionage Act did not permit the imposition of a death sentence, in that year Congress changed the maximum punishment and authorized capital punishment. The Court of Military Appeals concluded, "By increasing the punishment and by not specifically authorizing trial by courts-martial of those violators who are subject to military law, Congress fixed the trial of peacetime violators of the Espionage Act in its most serious aspect, if committed within the confines of the United States or on the high seas, beyond the pale of military courts."[14]

111. EVIDENCE

During the period under examination the Court considered many diverse evidentiary problems. In two cases the status of depositions introduced into evidence in court-martial proceedings was clarified. In the first of these, stating that a deposition is not an exhibit but rather the equivalent of the testimony of an unavoidably absent witness, the Court held that permitting a court to examine such evidence in closed session over defense objection constitutes error requiring reversal on a showing of prejudice.' Such a showing was held to exist where the prosecution case relied mainly on depositions which were submitted to the court in closed session while a defense motion to similarly submit a transcript of the accused's testimony was denied.[2] However, in ***United States* v. *Politte,***[3] where the accused admitted making a confession which was recounted in a deposition of his commanding officer but sought to tender an excuse for said confession, the Court, although finding error in permitting consideration of the deposition in closed session, concluded that no prejudice resulted since "the court-martial had no issue to determine as to the statements made in the deposition when it retired into closed session."

Documents of a different nature were the subject of consideration in ***United** States* v. *Grasso.*[4] There the accused was convicted,

[14] Id. at 10 USCMA 179.

[1] United States **v.** Jakaitis, 10 USCMA 41, **27** CMR 115.

[2] *Ibid.*

[3] 10 USCMA 134, 27 CMR 208.

[4] 9 USCMA 579, 26 CMR 369.

inter alia, of larceny of an electric razor. The razor had been recovered from the accused by an investigator who testified that the accused claimed to have purchased it at a Navy exchange. The investigator's further testimony that he had checked the records of the exchange and found no record of any such purchase by the accused was the subject of dispute, it being contended on appeal that it constituted hearsay since the admissibility of the examined records had never been determined. The Court concluded that neither the business entry exception to the hearsay rule nor the best evidence rule apply when the facts sought to be proved are independent of the writing and are based upon the witness' own knowledge and conduct. What is to be established in this situation is the absence of an entry which is separate from the content of an entry. Proof that a search has been made of a record and that no entry was found to exist, although involving in a sense the document's terms, usually does not require the document's production for proof.

The effect of the absence of requested counsel at the investigative stage on the consideration of an accused's statement, first considered in *United States* v. *Gunnels,*[7] was the subject of further amplification by the Court. The Court clearly established that before an issue of voluntariness may be raised by the alleged denial of opportunity to consult counsel at the investigative stage, a clear relationship must exist between that fact and the accused's statement." Thus, where an accused makes a statement in the belief that he could not consult with counsel until he had done so, an issue of voluntariness may be raised.' However, where an accused requested legal assistance at the outset of an interview which terminated without anything of an incriminating nature arising, did not renew this request the following day when he advised the investigator that he was ready to talk and there was evidence that the accused confessed because he had been told that a witness had identified him as being connected with the offenses suspected, the Court held that even if there was an improper denial of counsel at the first interview, it had no apparent effect or influence on the second meeting between the accused and the agent.[8]

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[5] 8 USCMA 130, **23** CMR 354.

'United States v. Cadman, 10 USCMA **222, 27** CMR **296;** also United States v. Cates, **9** USCMA 480, **26** CMR **260.**

[7] United States v. Cates, *supra.*

[8] United States v. Cadman, *supra.*

Voluntariness in a different setting formed the basis of the decision in *United States* v. *Forslund*.[9] There the Court ruled that testimony concerning the results of a urinalysis was inadmissible when the accused provided the specimens only after being ordered to do so, after initially refusing to supply such specimens. Such an order violates Article 31, Uniform Code of Military Justice. This article was also the subject of consideration in determining the admissibility of certain evidence in *United States* v. *Morse*.[10] There, in the absence of an Article 31 warning, a criminal investigator, in an effort to discover detection powder indicating the person responsible for breaking into various slot machines, examined the hands ,and gloves of a soldier who had been ordered to report to the orderly room together with the clothing worn by him on a certain occasion. Only after ascertaining the presence of detection powder by observing the accused's hands and gloves, as well as examining the gloves under ultraviolet light, did the ivestigator provide the accused with the required Article 31 warning. The Court held that the visual inspection of the person of an accused or suspect does not violate any Constitutional right or Article 31 of the Uniform Code. Such an inspection does not require a suspect to say anything or produce any incriminating evidence. The observations of that which is open to view and patent in either natural or artificial light is neither a search nor does it require a statement within the meaning of Article 31. The Court further held that the visual examination of an accused's outer garments at the time of his interrogation does not constitute an unlawful search, nor does such an inspection trespass upon his privacy.

Search and seizure principles received considerable examination in several other cases also. Thus, the Court reaffirmed the view that wherever receipt of evidence obtained by a search is challenged, the prosecution must affirmatively establish the justification for the search to the satisfaction of the law officer.[11] Such justification was found when a first sergeant secured and examined a duffle bag discovered in a storeroom where the bag was believed to contain narcotics.[12] The Court reasoned that the seizure under these circumstances was legal since a noncommissioned officer who becomes aware of the presence of marihuana,

[9] 10 USCMA 8, 27 CMR 82.
[10] 9 USCMA 799, 27 CMR 67.
[11] United States v. Sessions, 10 USCMA 383, 27 CMR 457.
[12] United States v. Bolling, 10 USCMA 82, 27 CMR 156.

the possession of which is presumed to be unlawful and which can easily be concealed or removed, in a common area within the command clearly visible to anyone who happens to look, acts reasonably in seizing the material. Moreover, the subsequent examination of the duffle bag was reasonable since, having lawfully taken possession of it and knowing it to contain narcotics, there was a duty upon military authorities to segregate the contraband from the personal effects of the owner and impound the prohibited material. Such action required a search to make certain that all residue of the narcotics was removed. However, another effort by military authorities to discover the presence of narcotics resulted in the Court's announcing that, although there is substantial discretion vested in a commanding officer to order a search of persons and property under his command, mere suspicion of wrongdoing generally will not justify a search of the person.[13] The Court stated, "although the military permits certain deviations from certain civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same."[14]

IV. THE ROLE OF THE TRIAL PARTICIPANTS; AFFIRMATIVE DEFENSES; APPEAL AND ERROR

Despite Judge Latimer's protest that "ever since the right to counsel became part of military law in the United States, it has been permissible for officers of the line or other services to represent individuals who were on trial in military courts,"[1] the Court of Military Appeals has ruled that even at his own insistence and with full advice as to his right to be represented by qualified counsel, an accused cannot elect to be represented only by a non-lawyer before a general court-martial.[2] Stating that it is imperative that only qualified lawyers be permitted to practice before a general court-martial, the Court directed that the practice of permitting representation by non-lawyers before such courts be completely discontinued. However, this rule does not prohibit an accused from conducting his own defense, nor does it prevent his consulting a non-lawyer, or having a layman seated at counsel table.

While expressing disfavor on the practice of a trial counsel appearing as a witness, the Court has held that so long as he is

[13] **United States v. Brown, 10 USCMA 482, 28 CMR 48.**

[14] *Id.* **at 10 USCMA 488.**

[1] **United** States v. **Kraskouskas, 9 USCMA 607, 26 CMR 387,390.**

[2] *Ibid.*

not incompetent by statute or his testimony inadmissible under accepted rules of evidence, an accused may not assert legal error merely because the prosecutor testifies and does not thereafter disqualify himself from further participation in the case.[3] However, it is improper for trial counsel' or the law officer" to suggest, at any .point in the proceedings, that an accused would be the proper party to testify on a given matter. Such a suggestion may be regarded as a comment on the accused's failure to testify. Although advising an accused of his right to remain silent during court-martial proceedings in open court does not constitute such a comment by the law officer, the Court has indicated that this practice is unnecessary and undesirable under present circumstances since an accused is represented by qualified counsel who should be fully aware of his obligation to advise his client in this regard." If a law officer considers it necessary to provide an accused with advice in these premises, it should be given out of the hearing of the court since such advice may result in emphasizing the accused's failure to testify.

The law officer's obligations in guilty plea cases were the subject of considerable attention. In such cases, the trial judge must inquire into the circumstances and determine whether the plea is the result of the accused's free will and desire to admit his guilt.[7] However, where a law officer, although informing the accused of the meaning of the plea and its consequences and advising him that despite a pretrial agreement with the convening authority he could plead not guilty, failed to further inquire into the voluntariness of the plea, the Court refused to find prejudicial error since the accused adhered to his plea after having full opportunity to consult with his counsel and never claimed that his plea was improvident or ill advised or was the result of any consideration other than his own consciousness of guilt.[8] And no reversal was granted when defense counsel refused to permit an accused to answer a question by the law officer as to whether the accused pleaded guilty because he was guilty." The Court indicated disapproval of defense counsel's tactics under these circumstances, stating, "a specific acknowledgment of guilt by the accused ordi-

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[3] **United States** v. **McCants, 10 USCMA 346, 27 CMR 420.**
[4] **United States v. Bowen, 10 USCMA 74, 27 CMR 148.**
[5] **United States v. Allinder, 9 USCMA 575, 26 CMR 355.**
[6] **United States v. Endsley, 10 USCMA 255, 27 CMR 329.**
[7] **United States** v. **Butler, 9 USCMA 618, 26 CMR 398.**
[8] ***Ibid.***
[9] **United States** v. **Palacios, 9 USCMA 621, 26 CMR 401.**

narily helps the law officer determine that the plea is voluntary and true."[10]

Another aspect of the guilty plea program considered by the Court was the propriety of a law officer's entering a finding of guilty after a plea to that effect." The Uniform Code provides that no person may be convicted except by concurrence of two-thirds of the court members present at time of voting (Art. 52), and that voting by members of special and general courts-martial shall be by secret written ballot (Art. 51(c)). No exception is provided for guilty plea cases. Although concluding that the failure of the court to make findings did not constitute jurisdictional error and although, the court members as reasonable persons being unable to return any verdict except a finding of guilty, specific prejudice was not found in the decided case, the Court clearly indicated its disapproval of the practice. Noting that the procedure was apparently adopted to expedite the proceedings, the Court stated, "we disapprove of expedients which are in conflict with the Code. Law officers are required to follow the law even though some procedural steps may appear to them to be unnecessary. Congress has not seen fit to do away with findings by a court-martial on guilty plea cases, and law officers should not question the wisdom of the legislation."[12] The Court further warned, "Were there present in this record the remotest possibility that the accused was harmed by the proceedings followed", reversal of the conviction would be required.'"

Before calling for objections to his ruling denying a motion for a finding of not guilty made at the close of the prosecution case, the law officer should instruct a court on the elements of the offense under consideration.[14] However, his failure to do so may not result in a finding of prejudicial error where there is no objection to the ruling and the evidence is in such a posture that the findings ultimately returned demonstrate that the majority of the court must have been convinced that every element of the offense had been established at the conclusion of the prosecution's case.

It is apparent that a law officer must avoid the appearance of arbitrariness at the trial. Thus, under certain circumstances, his

[10] *Id.* at 26 CMR **402.**

[11] United States v. Cruz, 10 USCMA **458,** 28 CMR **24.**

"*Id.* at 10 USCMA **462.**

[13] *Ibid.*

[14] United States v. McCants, 10 USCMA **346, 27** CMR 420.

refusal to permit the defense to state grounds for an objection to the receipt of evidence may be objectionable.[15] And, the Court has ruled that where an accused requests an out-of-court hearing on the admissibility of his pretrial statement, its denial constitutes error. It is mandatory that such a requested hearing be held.[16]

As usual, during the survey period the Court of Military Appeals had occasion to consider a multitude of instructional questions. Thus, the Court opined that it is inadvisable and undesirable to advise a court that insanity may be feigned easily." Instructions on reasonable doubt were the subject of consideration in several cases. An instruction to the effect that the court could find the accused guilty of any offense which it believed beyond a reasonable doubt from the evidence he had committed but that the accused should be acquitted of any offense that the court was convinced beyond a reasonable doubt from the evidence that he had not committed, was erroneous in that it required the court members to be convinced of the accused's innocence beyond **a** reasonable doubt before they could acquit.[18] But where the law officer's instructions on this question as a whole clearly advised the c'ourt-martial that the prosecution had the burden of proving the accused's guilt beyond a reasonable doubt and that the court must find each element of the offenses charged to have been established beyond a reasonable doubt, the instructions were sufficient even though they did not expressly advise that if there is a reasonable doubt as to guilt, such doubt must be resolved in favor of the accused.[19] An instruction defining reasonable doubt is sufficient when it informs the court-martial that an accused is presumed innocent, that the court members must be convinced of guilt beyond a reasonable doubt by the evidence adduced in court before they can convict, that proof of that degree means proof to a moral certainty although not necessarily an absolute or mathematical certainty, that a reasonable doubt is one for which good reason can be given in the light of all the evidence, and that such doubt is absent in the mind of each member only if there was an abiding conviction of the accused's guilt such as he would be willing to act upon in the more important matters relating to his own affairs.?" The fact that this instruction includes a statement to

[15] United States v. Brown, 10 USCMA **482,** 28 CMR **48.**
[16] United States v. Cates, 9 USCMA **480, 26** CMR **260.**
[17] United States v. Richards, 10 USCMA 475, 28 CMR 41.
[18] United States v. Skonberg, 10 USCMA **57, 27** CMR **131.**
[19] United States v. McClary, 10 USCMA **147, 27** CMR **221.**
[20] United States v. Kloh and Neely, **10** USCMA 329, 27 CMR **403.**

the effect that a reasonable doubt is one for which a good reason can be given does not render it defective. As the Court stated, "while the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty, and court-martial members should not be told that the term reasonable doubt means a doubt not based on reason."[21]

Instructions on credibility of witnesses received attention in *United States* v. *McClary*[22] and *United States* v. *Baldwin*.[23] In the former case, the Court held that where a law officer correctly instructed on the credibility of witnesses generally, there was no error in including an instruction to the effect that in weighing the testimony of an accused the court may consider that he is highly interested in the outcome of the proceedings. In *Baldwin*, two aspects of the credibility question were examined. First, the court held that since the maxim "falsus in uno, falsus in omnibus" merely embodies a permissive inference rather than a mandatory rule of law, a law officer does not err in failing to give a requested instruction to the effect that if the court found any witness had falsely testified to a material matter it could disregard the entire testimony of that witness. And in the same case, involving charges of assault and rape, the Court held adequate an instruction on credibility to the effect that evidence that the victim was a prostitute could be considered in regard thereto, that a conviction could not be based upon the uncorroborated testimony of the victim if it was self-contradictory, uncertain or improbable, that evidence of conviction of an offense involving moral turpitude could be considered in determining a witness' credibility, and that in making its determination of credibility the court could also consider its own observations of the witnesses as they testified as well as the nature of their testimony particularly from the standpoint of certainty, probability and internal consistency.

Although no sugnificant change in the substantive law of mental responsibility occurred during the survey period, the Court did have occasion to note that whenever testimony raises issues both as to an accused's mental responsibility for the offense in issue and his mental capacity to stand trial, the law officer, by his instructions, should require separate findings on each issue.[24] However, where no effort was made by defense counsel to raise the

[21] *Id.* at 10 USCMA **332.**
[22] 10 USCMA 147, **27 CMR 221.**
[23] 10 USCMA **193,** 27 CMR 267.
[24] United States v. Crigler, 10 USCMA **263, 27** CMR **337.**

issue of capacity as an interlocutory question or distinguish between the two issues in questioning or argument and there was no proof of a change in the accused's mental process in the 60 days between offense and trial, no prejudice was found in the law officer's instructing only on the general issue of insanity since the decision on the general issue would also be regarded as dispositive of any question as to the accused's capacity to stand trial.

In *United States* v. *Hairston,*[25] the Court had occasion to examine the instruction on the inference arising from the possession of stolen property. The Court held that advice to the effect that proof that a person was in possession of recently stolen property, or a part of it, permits an inference that he stole it, but in order to permit such an inference, the evidence must show that such possession was recent, personal, exclusive, and conscious, and "unexplained or unsatisfactorily explained, did not improperly shift the burden of proof. If there is no explanation for the described possession of stolen property, the accused runs the risk of having the court draw the inference of guilty possession against him. Accordingly, to avoid such a result, an accused bears the burden of explaining his possession. Of course, this burden must be distinguished from that of proving guilt beyond a reasonable doubt, which always rests upon the Government. The Court distinguished the instant instruction from that on an unexplained absence considered in *United States* v. *Soccio,*[26] by stating that an absence alone does not provide the basis for the intent to remain away permanently. Thus, an accused has no obligation to explain an absence.

In delineating the responsibilities of the various trial participants, the Court has made it clear that court members must be circumspect in their attitude toward the law officer[27] and defense counsel.[28] Except in those instances where the Code gives the court the right to overturn a law officer's rulings, court members must accept his rulings and not become piqued at his decisions.[29] Of course, a law officer must take care in restricting the examination of witnesses by court members,:"'or the latter's examination on voir dire.[31]

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[25] 9 USCMA 554, 26 CMR **334.**

[26] **8** USCMA 477, 24 CMR **287.**

[27] United States v. Duncan, 9 USCMA **465,** 26 CMR **245.**

[28] United States v. Lynch, 9 USCMA **523,** 26 CMR **303.**

[29] See United States v. Duncan, *supra.*

[30] *Ibid.*

[31] United States **v.** Lynch, *supra.*

In considering the availability of the defense of double jeopardy to military accused, the Court held that the earliest point when jeopardy may attach in a court-martial is at the reception of evidence on the general issue.[32] But even after the reception of such evidence, the Court may refuse to consider the merits of an accused's contention that his conviction was illegal on the grounds of double jeopardy where the procedure followed was that suggested by the defense.[33] And, when the trial proceedings are interrupted for good and valid reasons other than the failure of proof, the incompleted action will not support a former jeopardy defense. The dismissal of charges because of a material variance between pleading and proof will not preclude an accused from being tried under proper charges.[34]

In *United States* v. *Rock*,[35] the Court made clear that the defense of entrapment generally will not be available to one already engaged in a course of criminal conduct similar to that ultimately charged prior to the participation of Government agents and where the accused indicates a ready willingness to violate the law, even though persons acting on behalf of the Government encourage the accused in a course of criminal conduct. "Mere requests or suggestions to an accused to obtain contraband goods are well within the bounds which the law countenances.""; However, where there is evidence that a person working closely with law enforcement agents acted in such a manner that without his cooperation the accused would not have been able to commit the charged offense, an issue as to entrapment may be presented.[37]

For the purpose of Article 43(f), Uniform Code of Military Justice, suspending the statute of limitations as to certain offenses in time of war "until three years after the termination of hostilities", the three year period constitutes a preliminary period which must elapse after the termination of hostilities *before* the period of limitations applicable to the particular offense involved commences to run.[38] And, concluding that for the purposes of the aforementioned provision the Korean conflict constituted a war even as to offenses committed within the continental limits of the United States, the Court held that presenting a claim for traveling

[32] United States v. Wells, 9 USCMA 509, 26 CMR 289.
[33] United States v. Ivory, 9 USCMA 516, 26 CMR 296.
[34] *Ibid.*
[35] 9 USCMA 503, 26 CMR 283.
[36] *Id.* at 26 CMR 286.
[37] United States v. Horne, 9 USCMA 601, 26 CMR 381.
[38] United States v. Swain, 10 USCMA 37, 27 CMR 111.

expenses of dependents knowing it to be false constitutes an attempt at fraud of a pecuniary nature upon the Government and thus falls within the provisions of Article **43** suspending the statute of limitations in such cases in time of war. Insofar as the offense of dishonorable failure to pay debts is concerned, the Court held that the civilian rule that the statute of limitations runs from the date a debt is due and payable is inapplicable.:'[39] This result is due to the fact that mere nonpayment does not establish that a default is dishonorable.

Although technically not a part of the law of affirmative defenses, mention of the *United States* v. *Swanson*[40] seems appropriate at this point. There the Court viewed the relationship between **a** discharge in bankruptcy and a prosecution for failure to pay debts, stating that a discharge occurring before a failure to pay has become "dishonorable" can remove the basis for a subsequent charge of a violation of the Uniform Code on the basis of indebtedness. However, it appearing in the cited case that the crime had been committed prior to the bnakruptcy proceedings, the bankruptcy discharge did not render the accused immune from criminal liability. Reaffirming that the dishonorableness justifying imposition of criminal liability for a serviceman's failure to deposit or maintain sufficient funds to meet presentment of a previously drawn check involves demonstrable bad faith or gross indifference on the part of the accused, the Court found the evidence insufficient to sustain a conviction when an accused had offered to redeem checks prior to their actual dishonor by the drawee bank and the offer to redeem accorded with a previous accepted practice whereby men had been permitted to redeem returned checks without further adverse consequences."-"

Turning now to the area of appeal and error, only a few cases merit examination. In *United States* v. *Hurt*,[42] recognizing that JAGC officers are often called upon to serve in various capacities in the administration of military justice and that a mere change of duty assignment does not imply bias or prejudice, the Court held that the transfer of a member of a board of review to the Government Appellate Division after argument but before publication of the opinion and decision in a case did not disqualify said officer from acting as a board member in that case.

[39] United States v. Atkinson, 10 USCMA 60, *27* CMR **134.**
[40] 9 USCMA 711, 26 CMR 491.
[41] United States v. Brand, 10 USCMA **437,** 28 CMR **3.**
[42] 9 USCMA *735,* 27 CMR **3.**

In two cases, the Court concerned itself with the perfecting of an accused's appeal. Ruling that a decision by an accused not to request appellate counsel should be predicated only on the merits of an individual case and the accused's own desires, and that it should not be based upon considerations of service expediency, convenience or its effect upon other cases, the Court stated that trial defense counsel must advise an accused of his appellate rights.[43] Such advice should provide an accused with as much information regarding his rights as possible so that he can make an intelligent decision in regard to the review of his case. In this connection, advice in these premises prior to the staff judge advocate's review and convening authority's action may be premature, and advice to an accused "as to what he [has] to lose and not what he [has] to gain by appellate defense representation" may be inadequate.[44] This is not to say that a defense counsel may not, along with other advice, proffer his opinion as to the value of appellate representation.[45] And in *United States* v. *Doherty*,[46] the Court took pains to emphasize that where an accused, pursuant to his request, received a punitive discharge prior to the expiration of his time to petition the Court, the request stating the accused's understanding that if he petitioned within the alloted time any action taken toward effecting his discharge would be revoked, neither the request nor the failure of the Government to revoke the discharge deprived the accused of his right to have the Court review his conviction.

In connection with the powers of boards of review, the Court, distinguishing between suspension and remission on the theory that the former postpones while the latter annuls, ruled that *a* board of review does not have the power to suspend a punitive discharge. Such power exists only in the President, the Secretary of the Department and the convening authority. However, when the sentence before the board of review already contains a suspension, the board may reduce the period of suspension.[47]

V. POST-TRIAL REVIEW

Continuing their amplification of the requirements of the post-trial review as enunciated in *United States* v. *Fields*,[1] during the

[43] United States v. Darring, 9 USCMA 651, 26 CMR 431.
[44] *Ibid.*
[45] United States v. White, 9 USCMA 692, 26 CMR 472.
[46] 10 USCMA 453, 28 CMR 19.
[47] United States v. Estill, 9 USCMA 458, 26 CMR 238.
[1] 9 USCMA 70, 25 CMR 332.

survey period the Court held insufficient a review wherein, while summarizing the evidence and expressing his opinion as to its sufficiency, the staff judge advocate failed to state the rationale for his opinion.' The Court reasoned that in a case involving disputed questions of fact, "a mere summarization of the testimony does not necessarily point to the correct conclusion. Rationalization is required. And if the reasons offered for the conclusions are not persuasive, the conclusion may be unsound."[3] In *United States* v. *Jemison*,[4] the Court turned its attention to the clemency portion of the review. Holding that it is only where the reviewer abuses his discretion by the omission of significant clemency factors will a review be considered inadequate in this regard, the Court reiterated its long standing admonition that an accused is entitled to a "careful and individualized" consideration by the convening authority of the appropriateness of the adjudged sentence. Since the staff judge advocate in the decided case did discuss testimony of the accused's superiors concerning his character and efficiency, as well as a number of letters favorable to the accused which had been received from various people, his failure to refer to the accused's ('attitude, appearance or personality", or to the Army's administrative directive concerning suspension of sentences did not constitute an abuse of discretion.

Insofar as the physical preparation of the review is concerned, it is clear that a staff judge advocate need not personally read every page of the record in every case or actually compose every review." What is especially important is that he learn the facts and legal issues "so that he can determine whether the accused has been denied military due process."[6] There may be cases wherein the issues and matters are strongly contested and the testimony is in conflict. In such cases the staff judge advocate cannot rely upon the preliminary consideration of his assistant but must read the record itself; in no other way is he enabled to make informed judgments and recommendations on the credibility of the witnesses and the weight of the evidence.'

[3] United States v. Bennie, 10 USCMA 159, **27** CMR **233.**
[4] *Id.* at 10 USCMA 160.
[4] 10 USCMA 472, 28 CMR 38.
[5] United States v. Kema, 10 USCMA **272,** 27 CMR **346.**
[6] *Id.* at **10** USCMA **274.**
[7] *Id.* at 10 USCMA 275.

VI. INEFFECTIVE TRIAL REPRESENTATION AS A GROUND FOR COURT-MARTIAL REVERSAL

In several cases decided during the survey period, the Court continued to express its views as to the obligations of a defense counsel toward an accused person. Although recognizing "that the effectiveness of a defense counsel cannot be measured solely by the outcome of the trial", the Court held a defense counsel guilty of inadequate representation where he viewed as "frivolous in the extreme" an affirmative defense ultimately deemed to have merit by the highest military appellate tribunal.[1] The Court indicated that in examining for adequacy of representation, it will expect the highest degree of professional competency from appointed defense counsel. In *United States* v. *Faylor*,[2] one of two co-accused represented by the same appointed counsel was found to have been deprived of the undivided loyalty of his counsel when, after findings based upon guilty pleas, said counsel indicated to the court-martial that the appellant was more or less the leader in the affair. The Court stated, "the sideline tactics of counsel with an apparent objective of totally sacrificing the accused Faylor in an attempt to impress the court with the need of mitigation for his other client left the accused Faylor inadequately and ineffectively represented." However, in a not incomparable situation in *United States* v. *Young*,[3] where two accused were jointly tried for assault with a dangerous weapon, defense counsel's argument on findings indicating that one of the two was the more responsible was held not to indicate favoritism of appellants' co-accused to the former's detriment. It must be noted, however, that a written pretrial statement made by the accused and introduced into evidence by the Government, supported the argument presented by counsel. Noting that defense counsel "cannot be expected to accomplish miracles" and "must face up to the facts that are in the record," the Court made it clear that joint representation by a defense counsel "docs not mean counsel cannot acknowledge and argue the relative weight of the evidence as it affects different individuals being tried at the same time." As the Court understands a conflict in interest, "it means defense counsel cannot adequately represent one accused without prejudice to another."[4]

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[1] United States v. Horne, 9 USCMA 601, **26** CMR 381.

[2] 9 USCMA 547, **26** CMR **327.**

[3] 10 USCMA 97, 27 CMR 171.

[4] *Id.* at 10 USCMA 99.

VII. SENTENCE AND PUNISHMENT

Although the sentencing phase of court-martial proceedings has not been held to the rigid evidentiary standards obtaining at the trial proper, the Court of Military Appeals has scrutinized rather carefully the admission of previous convictions as bearing on sentence appropriateness. The cardinal prerequisite to admissibility, of course, is that the offered conviction in fact be previous to the offense of which the accused stands presently convicted, and the erroneous consideration of a conviction for an offense committed subsequent to that at bar necessitates sentence reassessment by a board of review.[1] The circumstance that an offered conviction is subsequent to one or more of the offenses of which the accused stands convicted, however, will not affect its admissibility if it is previous to one of the offenses at bar.[2] An extract of the accused's service record is competent proof of previous convictions, and the fact that an extracted initial order promulgating the result of a former trial is silent as to the completion of appellate processes will not preclude consideration of the conviction unless the accused shows that finality has not in fact attached.[3] The unsworn statement of trial counsel that the accused has certain previous convictions, though affirmatively sanctioned by the defense, is incompetent to establish the convictions, and will be reversible error unless the sentence was clearly unaffected thereby.[4]

The Court of Military Appeals has been insistent that the integrity of the sentencing process be protected against extraneous influences and that those charged with determining sentence appropriateness discharge that discretionary function without deference to the policy statements, preferences, or possible further clemency actions of others who may be interested in court-martial sentences. Thus, no longer may the members of a court-martial turn to the Manual for Courts-Martial for guidance in sentence matters, access thereto in sentence deliberations, as on the merits, having been prohibited by the Court of Military Appeals save in

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[1] United States v. Crusoe, 3 USCMA 793, 14 CMR 211.

[2] United States v. Geib, 9 USCMA 392, 26 CMR 172; United States v. Green, 9 USCMA 585, 26 CMR 365.

[3] United States v. Larney, 2 USCMA 563, 10 CMR 61.

[4] United States v. Zimmerman, 1 USCMA 160, 2 CMR 66.

the case of the president of a special court-martial.: Any indication to the court members that the convening authority desires **a** particular sentence — as where trial counsel suggests that reference of the case to trial before a general court reflects the wish that the accused be separated from the service — improperly impinges upon the discretion of the court members.[6] That the trial counsel's argument for punitive discharge is based upon a Manual policy applicable to a class of offenders—*e.g.*, thieves — rather than the immediate commander's desires as to a particular accused, does not render the argument less objectionable; in arriving at an appropriate sentence the court-martial is to be free from the influence of all policy directives.' Similarly, a convening authority violates his statutory duty to make an independent evaluation of sentence appropriateness when, in blind reliance upon a departmental instruction designed to rid the service of homosexuals, he refuses to consider the clemency recommendation of the court-martial.[8] Nor may those charged with determining sentence appropriateness be influenced, in their deliberations, by the pressures of the local community for an exemplary sentence.[9]

As has already been suggested, a corollary of the rule that those required to fit the punishment to the crime be unfettered in their discretion is that they shall exercise that unrestrained discretion in full, without regard to further reductive action by higher appellate authorities. Thus, **a** court-martial evidences **a** lack of appreciation of its sentence responsibilities when it imposes **a** punitive discharge but, based upon mitigating circumstances already considered by it, recommends that the discharge be dis-

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'United States v. Rinehart, 8 USCMA **402, 24** CMR **212.** Although Rinehart indicates that the law officer is to be the exclusive source of the law to be applied by the court-martial on sentence, his failure to instruct on maximum punishment, though error, will not always require reversal. See United States v. Reid, **10** USCMA **71, 27** CMR **145,** where an uninstructed special court which, nevertheless, did not exceed its jurisdictional limitations was considered to have been aware of *its* Codal powers.

[6] United States v. Lackey, 8 USCMA **718, 25** CMR **222.**

'United States v. Rinehart, *supra.* Accord: United States v. Choate, 9 USCMA **680, 26** CMR **460,** holding reversible error a law officer's reference to Naval Supplement's policy that three months confinement or punitive discharge would be accompanied by reduction in grade.

[8] United States v. Doherty, **5** USCMA **287, 17** CMR **287.**

[9] United States v. Brennan, 10 USCMA 109, **27** CMR **183;** United States **v.** Mamaluy, 10 USCMA 102, **27** CMR **176.** And see United States v. Hurt, 9 USCMA **735, 762, 27** CMR **3.**

approved[10] or that separation be effected instead by administrative measures.'' Likewise, though a board of review may properly recommend such forms of clemency as it is unempowered to accomplish (e.g., suspension or commutation), it may not abdicate its statutory duty to affirm only an appropriate sentence by recommending that The Judge Advocate General effect clemency which the board of review itself may competently administer.'?

A detailed exposition of the types of punishments available to courts-martial and the myriad rules relating to permissible and prohibited punishments would unduly extend the scope of this discussion. Chapter XXV of the Manual, despite its considerable editing by the Court of Military Appeals, may generally be relied upon in this area. Some observations concerning the more usual types of punishments (dismissal, punitive discharge, confinement, forfeiture, fine and reduction), however, with particular emphasis upon Manual rules which have been modified or invalidated by the Court, are in order here.

Since both dishonorable discharge and dismissal involve separation from the service with dishonor, the fact that a court-martial adjudges a dishonorable discharge for an officer is not a fatal error ; the discharge, under such circumstances, may properly be effected as a dismissal.[13] However, dismissal of an officer is not limited to those offenses for which a punitive discharge may be imposed upon an enlisted man, An officer convicted of any offense under the Code may be sentenced to dismissal, subject only to considerations of appropriateness.[14] A bad conduct discharge is

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'' United States v. Kaylor, 10 USCMA **139, 27** CMR **213.** The fact that the inconsistent clemency recommendation is not contemporaneous with the announcement of the sentence appears to be immaterial, at least where at the time of the sentence the court evidences its willingness to consider the recommendation of some type of clemency. United States v. Story, 10 USCMA **145, 27** CMR **219.** Kaylor and Story severely restrict United States v. Doherty, **5** USCMA **287, 17** CMR **287,** which held a unanimous recommendation to remit a bad conduct discharge not to indicate the abandonment of the court's sentence discretion. The remaining vitality of Doherty, if any, is in those instances where the clemency recommendation is the result of the post-trial advocacy of the defense counsel.

'' United States v. Grcich, **10** USCMA **495, 28** CMR **61.** Nor may trial counsel be permitted to argue for the imposition of a severe sentence in reliance upon possible ameliorative action at higher levels. United States **v.** Simpson, 10 USCMA **229, 27** CMR **303.**

[12] United States v. Cavallaro, **3** USCMA **653, 14** CMR **71.**

[13] United States **v.** Bell, 8 USCMA **193, 24** CMR **3.**

[14] United States v. Goodwin, **5** USCMA **647,** 18 CMR **271.**

not a permissible punishment for a cadet; though not officers, cadets may be separated punitively only by dismissal.';

Paragraph 127j of the Manual for Courts-Martial, United States, 1951, states in part, "Confinement without hard labor will not be adjudged." Notwithstanding this Manual provision, it has been held to be error for the law officer to instruct that a sentence to confinement without mention of hard labor is improper, although in so holding the Court apparently agreed that, administratively, hard labor may be required of any accused sentenced to confinement.[16] The solitary confinement provisions of Paragraph 125 of the Manual have also been modified by judicial construction. Although that paragraph, in providing that solitary confinement shall not be adjudged against Army or Air Force personnel, seems to contemplate this type of punishment for other offenders, the Court has taken the position that no court-martial can impose solitary confinement.'; The imposition, in addition to the maximum confinement imposable for the offense of which an accused is convicted, of additional confinement unless a concurrently levied fine is paid, does not render the confinement legally excessive.[18] Although alternative confinement to enforce payment of a fine is not part of the *punishment* so as to limit the confining power of the court-martial, it is part of the *sentence* and is to be aggregated with the confinement adjudged as punishment for purposes of determining whether the sentence is such as to require review by a board of review under Article 66 of the Code.[19]

The idea that a court-martial is free to impose any sentence not forbidden by the Code or the table of maximum punishments is the unifying principle around which several recent decisions of the Court can be grouped. These cases have made it clear that several provisions of the Manual for Courts-Martial which deal with sentence policies of long standing are not to be considered as limiting the discretion of those charged with arriving at an appropriate sentence. In the celebrated cases of *Varnadore*[20] and *Holt*[21] the Court overturned precedents of long standing[22] to in-

[15] United States v. Ellman, 9 USCMA 549, 26 CMR 329.
[16] United States v. Dunn, 9 USCMA 388, 26 CMR 168.
[17] United States v. Stiles, 9 USCMA 384, 26 CMR 164.
[18] United States v. DeAngelis, 3 USCMA 298, 12 CMR 54.
[19] United States v. Garcia, 5 USCMA 88, 17 CMR 88.
[20] United States v. Varnadore, 9 USCMA 471, 26 CMR 251.
[21] United States v. Holt, 9 USCMA 476, 26 CMR 256.
[22] *E.g.* United States v. Brasher, 2 USCMA 50, 6 CMR 50; United States v. Long, 4 USCMA 101, 15 CMR 101.

validate Paragraph 127b of the Manual and hold that a law officer errs when he instructs to the effect that confinement in excess of six months without a punitive discharge is an illegal sentence. Not only may a court-martial impose confinement of any duration without a punitive discharge, but, notwithstanding Paragraph 126d of the Manual, it may now sentence an officer to confinement without dismissal.[23] The Court has been reluctant to find prejudice where instructions were given in reliance upon the now obsolete Manual guidance, however, unless the record indicates a possibility that but for the misinformation no punitive discharge would have been adjudged.[24] It is an open question whether a law officer may longer instruct that if life imprisonment is adjudged, a dishonorable discharge and total forfeitures should accompany it. When the validity of this Manual policy (Paragraph 126a) was challenged before the Court, it elected to leave the question unanswered and academic by holding that the accused was clearly not prejudiced, there not being "even a remote possibility the court members might have seen fit to adjudge a life sentence without the inclusion of a dishonorable discharge and total forfeitures."[25]

Although the confinement imposed by a court-martial begins to run when adjudged,[26] the accused remains an unsentenced prisoner until the sentence is ordered executed and cannot be required to work side by side with sentenced prisoners, performing the same labors, attired in the same fashion and without distinction from sentenced prisoners.[27] The fact that the confinement to which an accused has been sentenced has been served and he has been restored to duty does not render the legality of the sentence unappealable as moot, as computation of leave and longevity pay are affected by the validity of the sentence.[28]

The provision in Paragraph 127b of the Manual limiting forfeitures in the absence of a punitive discharge has been exercised by judicial fiat under the same rationale that caused the expunging of the similar limitation of that paragraph relating to confinement in the absence of a punitive discharge. A court-martial

[23] United States v. Smith, 10 USCMA 153, 27 CMR 227.

[24] United States v. Horowitz, 10 USCMA 120, 27 CMR 194; United States v. Miller and Kline, 10 USCMA 296, 27 CMR 370; United States v. Smith, *supra*.

[25] United States v. Jones, 10 USCMA 122, 27 CMR 196.

[26] United States v. Varnado, 7 USCMA 109, 21 CMR 235.

[27] United States v. Bayhand, 6 USCMA 762, 21 CMR 84.

[28] United States v. Prescott, 2 USCMA 122, 6 CMR 122.

may now impose forfeitures in excess of two thirds pay per month without adjudging a punitive discharge.[29] As in the related *Varnadore-Holt* area, however, an instruction framed in terms of the now erroneous language of the Manual will not be found to be prejudicial unless it fairly appears that the imposition of the discharge is attributable to the court-martial's erroneous understanding that a discharge was a prerequisite to a forfeiture of more than two-thirds pay.[30]

Minor irregularities in the announcement of forfeitures do not affect their validity so long as the amount and duration thereof may be accurately computed. Thus, a sentence of forfeitures expressed in terms of a fraction of pay for a number of months, rather in dollars and cents as Paragraph 126h of the Manual requires, is harmless error.[31] Similarly, forfeitures of fifty dollars per month "during confinement and until release therefrom" is not so indefinite as to be invalid.[32] The forfeitures in such a case, however, cannot be operative from the beginning of confinement, as confinement begins to run when adjudged while forfeitures cannot be made applicable until approved by the convening authority.[33] Where a sentence as adjudged and approved includes a punitive discharge and partial forfeitures (with no confinement), the convening authority, by suspending the execution of the punitive discharge, may order the forfeitures into execution.[34] The same is true if the approved sentence includes confinement of less than a year, whether or not the confinement is suspended.[35]

Fiscal statutes governing the pay of military personnel do not derogate from the sentencing powers vested in courts-martial by the Uniform Code, unless the fiscal acts expressly so provide. Thus, notwithstanding the provision in 10 U.S.C. 3636 that no pay or allowances accrue to enlisted men while in confinement under a suspended dishonorable discharge, an approved sentence

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[29] United States v. Jobe, 10 USCMA **276, 27** CMR **350.** Earlier, in United States v. Smith, **2** USCMA 119, **6** CMR 119 and in United States v. Phillips, **1** USCMA **349, 3** CMR **83,** the Court had given its implied approval to the forfeiture limitation in Paragraph **127b** of the Manual.

[30] United States v. Jobe, *supra;* United States v. Villa, 10 USCMA **226, 27** CMR **300.**

[31] United States v. Gilgallon, **1** USCMA **263, 2** CMR **170.**

[32] United States v. Smith, **3** USCMA **336, 12** CMR 92.

[33] *Ibid.*

[34] United States v. Watkins, **2** USCMA **287,** 8 CMR **87;** United States v. Trawick, **10** USCMA 80, **27** CMR **154.**

[35] United States **v.** Varnado, **7** USCMA **109, 21** CMR 235.

to suspend discharge, partial forfeitures, and confinement is a legal sentence even though the partial pay status contemplated by the sentence cannot be effected.""

Fines may be imposed upon enlisted personnel as part of a court-martial sentence only as a substitute for forfeitures, under the additional punishment provisions of Section B, Paragraph 127c of the Manual.[37] Though a lump sum fine is preferable, a fine assessed in installments is a perfectly legal sentence and will not be construed as a sentence to forfeitures.[38]

Paragraph 126e of the Manual, as amended by Executive Order 10652, 15 January 1956, provides generally for the automatic reduction to the lowest pay grade of enlisted personnel whose sentences, as approved by the convening authority, include a punitive discharge (whether or not suspended), confinement, or hard labor without confinement. This paragraph also authorizes courts-martial to sentence enlisted personnel to an inferior or intermediate pay grade. Early in its reign the Court of Military Appeals held that the automatic reduction aspect of the paragraph, whose validity it assumed, could not prevail over an adjudged sentence reduction to an intermediate, rather than the lowest, pay grade.[39] However, the Court has repudiated its earlier assumption of the validity of Paragraph 126e of the Manual and has ruled that the automatic reduction feature of the paragraph was an invalid judicial, as distinguished from administrative, provision designed unlawfully to increase the sentence in those cases in which a court-martial in its discretion chose not to reduce an accused upon whom it imposed a punitive discharge, confinement, or hard labor.[40] An interesting sidelight to the *Simpson* case is the Comptroller General's response that, notwithstanding the Court of Military Appeals' views, service finance officers are *not* authorized to pay enlisted personnel falling within the terms of the Manual provision except under the Presidential limitations there imposed.[41]

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[36] United States v. Cleckley, 8 USCMA 83, 23 CMR 307.

[37] United States v. Hounshell, 7 USCMA 3, 21 CMR 129.

[38] United States v. Cuen, 9 USCMA 332, 26 CMR 112.

[39] United States v. Flood, 2 USCMA 114, 6 CMR 114.

[40] United States v. Simpson, 10 USCMA 229, 27 CMR 303. In Simpson the reduction, which was a part of the convening authority's action, was set aside. Compare United States v. Littlepage, 10 USCMA 245, 27 CMR 319, where the convening authority's action was silent as to reduction, the reduction having apparently been accomplished subsequently pursuant to regulation. Notwithstanding the administrative quality of the action here involved, the reduction was held illegal under the Simpson rule.

[41] Comptroller General Decision B–139988, August 19, 1959.

Because suspension of the execution of a sentence is a species of clemency, the power is, in the military as in civilian criminal law, not an inherent attribute of a judicial tribunal. Historically, the power to suspend a court-martial sentence has been vested only in those authorities who may order the execution of the sentence, *i.e.*, the President, the Secretary of a Department, and the convening authority,[42] and the power is nonministerial and nondelegable.[43] Accordingly, neither a court-martial[44] nor a board of review[45] is empowered to suspend the execution of a sentence. If a court-martial purports to suspend the execution of a punitive discharge imposed by it, though the suspension is a nullity, the punitive discharge is unaffected thereby, so that if suspended by the *convening authority* it is a valid part of the sentence.[46] In such a situation, however, it is the law officer's duty to advise the court-martial that its purported suspension is a nullity, for if the convening authority refuses to perfect the suspension, the possibility that a properly informed court would have omitted a punitive discharge requires a sentence rehearing.[47] While a board of review may lessen the duration of an existing suspension which is before it, as a matter of sentence appropriateness,[48] neither a board of review,[49] nor a supervisory authority[50] can make more severe the terms or increase the duration of a suspension.

Although for more than eight years since the inception of the Uniform Code the services had, in reliance upon paragraph 88*e* of the Manual, operated under the impression that only suspensions which provided for automatic remission entailed the vacation proceedings required by Article 72 of the Code for the protection of probationers, the Court demonstrated unequivocally during the past term that this reliance was grosly misplaced. Thus the practice of suspending the execution of punitive discharges "until the completion of appellate review" or "until the completion of appellate review or release from confinement, whichever is later"—a practice which had not gone unnoticed

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[42] United States v. Simmons, 2 USCMA 105, 6 CMR 105.
[43] United States v. Butts, 7 USCMA 472, 22 CMR 262.
[44] United States v. Marshall, 2 USCMA 342, 8 CMR 142.
[45] United States v. Simmons, 2 USCMA 105, 6 CMR 105.
[46] United States v. Marshall, 2 USCMA 342, 8 CMR 142.
[47] United States v. Samuels, 10 USCMA 206, 27 CMR 280.
[48] United States v. Estill, 9 USCMA 458, 26 CMR 238.
"United States v. DeVore, 10 USCMA 375, 27 CMR 449; United States v. Crawford, 10 USCMA 464, 28 CMR 30.
[50] United States v. Butts, 7 USCMA 472, 22 CMR 262.

by the Court during these years[51]—was abruptly ended by two decisions of the Court indicating that the clemency of suspension, if granted at all, will ripen into automatic remission unless the suspension is vacated for cause under Article 72 of the Code. In *United States* v. *May* the Court held:

> "Once a convening authority so empowered, undertakes to suspend any portion of a sentence, such suspension — without reference to the language employed or omitted-constitutes the accused a probationer whose status may be changed only after a full hearing. As used in the Uniform Code, the word "suspend' is a word of art conveying the single meaning described above.""

The *Cecil* case decided the same day made it clear that the resulting probationary status was not affected by whether or not the accused whose discharge was suspended was sentenced to confinement.[53] Whether accused persons generally will suffer, as surely will the Government, by this interpretation of the Code remains to be seen. Such a possibility was not considered significant by a majority of the Court.

Sentence matters which sound in executive clemency—*e.g.*, remission, suspension, and mitigation — are not judicial matters.[54] In the military, however, broad discretionary powers over sentence are vested in both the convening authority and the board of review which, respectively, perform the initial and intermediate judicial review of court-martial convictions. Observing the difficulty and futility in distinguishing between clemency and sentence appropriateness at the board of review level, the Court has held that a board of review enjoys the same power as a convening authority to lessen the rigor of a legal sentence and, either from compassion, leniency or forbearance, may treat an accused less rigorously than its authority permits.[55] While a board of review, unlike a convening authority, may not consult a "guy named Joe" in its sentence consideration, anything considered by the convening authority and attached to the record of trial constitutes part of the "entire record" upon which, under Article 66 of the Code, the board of review's sentence approval must be based.[56] The clemency powers of the convening authority

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[51] *E.g.*, United States v. Watkins, 2 USCMA 287, 8 CMR 87, United States v. Hamill, 8 USCMA 464, 24 CMR 274.

[52] United States v. May, 10 USCMA 258, 27 CMR 432.

[53] United States v. Cecil, 10 USCMA 371, 27 CMR 445.

[54] United States v. Sonnenschein, 1 USCMA 64, 1 CMR 64.

[55] United States v. Lanford, 6 USCMA 371, 20 CMR 87.

[56] *Ibid.*

and boards of review are such that the minimum sentence for premeditated murder, binding on courts-martial, does not preclude these reviewing agencies from reducing a life sentence while affirming findings of premeditated murder.[57] In fact, the power to approve only a "fair and just punishment for every accused" permits affirmance of findings and disapproval of sentence in its entirety without ordering a sentence rehearing.[58] While it is axiomatic, of course, that no accused has a right to clemency, the Code affords to every accused the right to have those charged with reviewing his sentence give careful and individualized consideration to sentence appropriateness in each case — including the possibility of whatever clemency action the reviewer may be competent to take.[59]

In the field of clemency a sharp distinction must be drawn between mitigation (the lessening of punishment in kind) and commutation (alteration of the nature of punishment). As we have seen, convening authorities and board of review are fully competent to mitigate sentences!; commutation, however, is the prerogative of only the President and the Secretaries of the Departments (and their Assistants, if so designated).[60] Accordingly, even though it modifies the findings upon which a sentence rests, if the sentence is legal for the remaining offenses, a board of review may not commute a death sentence to life imprisonment?* or a dismissal to loss of numbers.[62] In such a case a sentence rehearing may be ordered or, if appropriate for the modified findings, the sentence may be affirmed with or without a recommendation to some competent authority that the sentence be commuted.[63] An exception to the rule that a board of review may not commute a sentence exists in the situation where the findings of premeditated murder upon which a death sentence is based are reduced to findings of unpremeditated murder. When this situation arose the Court held that the board of review's approval of life imprisonment, though commutation rather than mitigation, was within its statutory power.[64] Presumably this

[57] United States v. Jefferson, 7 USCMA 193, 21 CMR 319.

[58] United States v. Atkins, 8 USCMA 77, 23 CMR 301.

[59] United States v. Wise, 6 USCMA 472, 20 CMR 188.

[60] United States v. Goodwin, 5 USCMA 647, 18 CMR 271.

[61] United States v. Freeman and Emerson, 4 USCMA 76, 15 CMR 76.

[62] United States v. Goodwin, *supra;* United States v. Voorhees, 4 USCMA 509, 16 CMR 83.

[63] United States v. Freeman and Emerson, *supra.*

[64] United States v. Bigger, 2 USCMA 297, 8 CMR 97.

exception applies whenever the sentence is legally excessive for the findings, as modified by the board of review. Changing a fine of sixty-five dollars per month for six months to forfeitures of a like amount per month for four months does not constitute communtation; hence, a convening authority may properly modify a sentence in this fashion.[65]

One of the most significant concepts in the military law of sentences is that, except in the case of mandatory sentences, the severity of a sentence may not lawfully be increased at any stage of the proceedings or on rehearing. Though this idea appears in both articles 62 and 63 of the Code, and is implemented in the Manual, the case-law has enlarged upon the scope of its application. Most frequently errors involving sentence increases have arisen during the sentencing phase of the trial where a court-martial has announced its sentence only to have some irregularity therein brought to its attention by the law officer. Where such instances have resulted in the reconsideration and reannouncement of a sentence adding to the *quantum* of punishment first announced, the Court has consistently taken the view that the increased severity is a nullity.[66] This rule has not been applied so as to prevent the correction of a "slip-of-the-tongue'' which does not accurately announce the sentence arrived at by the court-martial, however. Thus, in the *Robinson* case, where the President of a court erroneously announced the forfeiture part of the sentence as $58.00 for three years and the court adjourned, the Court of Military Appeals held that correcting the sentence to read $58.00 per month for three years was permissible where the court reconvened and took this corrective action two minutes later, before the trial participants had left the courtroom.[67] The *Robinson* case left the question open as to just how long a delay would preclude the correction of these verbal misannouncements.

While appellate authorities may not render the terms of the sentence more severe,[68] they may clarify an earlier sentence action which only impliedly approved an element of the sentence.

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[65] United States v. Cuen, 9 USCMA 332, 26 CMR 112.

[66] United States v. Castner, 3 USCMA 466, 13 CMR 22; United States v. Long, 4 USCMA 101, 15 CMR 101; United States v. Hounshell, 7 USCMA 3, 21 CMR 129. *Cf.* United States v. Linder, 6 USCMA 669, 20 CMR 385.

[67] United States v. Robinson, 4 USCMA 12, 15 CMR 12.

[68] United States v. Butts, 7 USCMA 472, 22 CMR 262; United States v. DeVore, 10 USCMA 375, 27 CMR 449; United States v. Crawford, 10 USCMA 464, 28 CMR 30.

For example, where the convening authority of a special court approved and ordered executed the confinement and forfeitures, but suspended the bad conduct discharge without expressly approving it the supervisory authority directed clarification. The Court of Military Appeals held that the corrected action, identical with the original except for approval of the suspended discharge, did not increase the sentence, since the original action effectively, though impliedly, approved the discharge.[69] The sweep of the principle with which we are concerned can be appreciated by considering United States v. *Dean*.[70] There the Court held that the action of a convening authority reducing findings and sentence, even though set aside by a board of review which ordered a new action, establishes a ceiling above which a subsequent reviewing authority acting on the sentence cannot go, and is a limitation upon all subsequent proceedings in the case. The rule that a sentence adjudged on rehearing cannot be more severe than that originally adjudged does not limit the court-martial to the same or a mitigated sentence. Thus, where the original sentence was to a bad conduct discharge only, the court on rehearing may impose any sentence within its jurisdiction which is not more severe than a bad conduct discharge—*e.g.*, reduction in grade, reprimand or admonition.[71]

Although the Court of Military Appeals has interpreted Articles 66(d) and 67(e) of the Uniform Code as authorizing rehearings limited to the sentence alone,[72] the great bulk of sentences in which prejudice may have resulted from error committed at trial may be corrected during the appellate process without the necessity of a sentence rehearing. Thus, where it is determined on appeal that the law officer has erred in treating multiplicious charges as separate in instructing upon the maximum sentence, sentence reassessment by a board of review will generally cure the prejudice.[73] If an agency empowered to determine sentence appropriateness determines, without misconception as to the legal maximum, that the sentence is appropriate as adjudged, and was not affected by the erroneous instructions at trial, it may affirm

[69] United States v. McDaniel, 7 USCMA **56, 21** CMR **182.**

[70] **7** USCMA 721, **23** CMR **185.**

[71] United States v. Kelley, **5** USCMA **259, 17** CMR **259.**

[72] United States v. Miller and Kline, 10 USCMA **296, 26** CMR **460.**

[73] United States v. Brown, 8 USCMA **18, 23** CMR **242;** United States v. Dicario, 8 USCMA **353, 24** CMR **163;** United States v. Hood, 8 USCMA **473, 24** CMR **283;** United States v. Morgan, 8 USCMA **341, 24** CMR **151;** United States v. Rosen, **9** USCMA **175, 25** CMR **437.** But see United States v. Posnick, 8 USCMA 201, **24** CMR **11.**

the sentence without modification.[74] In the Lowe case the law officer overlooked the applicability of Footnote 5 to the Table of Maximum Punishments and erroneously instructed that the maximum sentence included a dishonorable discharge. The court imposed a bad conduct discharge and the board of review approved it without appreciating the Footnote 5 error. The bad conduct discharge could have been legally imposed, but only as additional punishment under Section B of paragraph 127c of the Manual, two previous convictions being properly before the court. Noting that resort to Section B is discretionary and not mandatory, the Court of Military Appeals held that sentence reassessment by the board of review was required in light of the applicability of Footnote 5.[75] The prejudice resulting from a special court's adjudging a sentence in excess of its jurisdiction is normally cured by appropriate reductive action by the convening authority or board of review.[76] When an accused convicted of larceny was sentenced, inter alia, to a punitive discharge by a court which was improperly advised of a departmental policy instruction urging the separation of thieves, the prejudice is not cured by reduction of confinement and forfeitures. In such a case the prejudice extends to the punitive discharge, and sentence reconsideration by the board of review, in light of this factor, is required.[77] Infirmities in the convening authority's action which relate solely to sentence—*e.g.*, ex parte consideration of extra record, adverse sentence matters—may also usually be cured by appropriate sentence action at the board of review level.[78]

Where one or more of several findings upon which a gross sentence is based is reversed on appeal, reconsideration of the sentence is obviously required. Here again corrective action does not ordinarily require a rehearing on the sentence at the trial

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[74] United States v. Crusoe, 3 USCMA 793, 14 CMR 211. Indeed, if the sentence as approved, when compared with the correct maximum, indicates that the effect of the erroneous instruction is *de minimis,* the Court of Military Appeals will not insist upon reassessment by a board of review. United States v. Teitsort, 9 USCMA 322, 26 CMR 102; United States v. Reams, 9 USCMA 696, 26 CMR 476.

[75] United States v. Lowe, 4 USCMA 654, 16 CMR 228. Compare, however, United States v. Oakley, where because of the wide disparity between the maximum instructed upon and the legal maximum under the correct interpretation of the offenses alleged, a sentence rehearing was deemed required. 7 USCMA 733, 23 CMR 197.

[76] United States v. Parker, 8 USCMA 704, 25 CMR 208. *Cf.* United States v. Peters, 8 USCMA 520, 25 CMR 24.

[77] United States v. Fowle, 7 USCMA 349, 22 CMR 139.

[78] United States v. Griffin, 8 USCMA 206, 24 CMR 16.

level. Although the Court of Military Appeals is without power to determine sentence appropriateness and accordingly will not approve a sentence even if legal for the modified findings, the boards of review are fully competent to remedy such a situation by sentence reassessment, so that generally in such cases the Court will return the case to the board level.[79] Where, however, the Court finds a fair risk that a sentence is allocable primarily to an offense set aside on appeal the appropriate remedy may be a sentence rehearing, rather than reassessment by a board of review.[80] When a modification of findings is effected by a board of review, the board does not ordinarily order a sentence rehearing. Even when the board cannot reduce the sentence—*e.g.*, where the sentence is to dismissal and dismissal is a legal sentence for the affirmed findings—a rehearing need be ordered only if the approved findings are so technical or minor that they do not fairly support the legal sentence.[81]

[79] United States v. Keith, **1** USCMA **442, 4** CMR **34.**
[80] United States v. Johnson, 7 USCMA 488, 22 CMR 278.
[81] United States **v.** Stene, **7** USCMA **277, 22** CMR **67.**

COMMENTS

"SIMILARITY" AND THE ASSESSMENT OF EXCESS COSTS UNDER THE GOVERNMENT DEFAULT CLAUSE

The standard default clause for fixed price supply contracts reserves to the Government two important contract rights: the right to terminate the contract for certain failures in the contractor's performance, and, should such a termination be effected (and should the contractor's failures not subsequently be found to have been excusable), the right to procure supplies or services "similar" to those terminated and to assess any excess costs against the contractor.[1]

This contractual right to purchase "similar" supplies and to recover any excess costs is vital to contract administration. Such a purchase is for the account of the contractor and, hence, without the scope of the advertising requirements of the Armed Services Procurement Act.[2] The funds obligated for the original contract remain available for use in the repurchase contract even though the latter is entered into in a subsequent fiscal year.[3] The provision has another practical function. It has been described variously as an "agreed modification of the method of ascertain-

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[1] ASPR 8–707 (5 Sep 1958) which provides in part:

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause."

[2] Standard Eng'r & Mfg. Co., ASBCA No. 3733 (14 Oct 1957), 57–2 BCA 5058 (dicta); JAGT 1955/2095, 21 Feb 1955.

[3] See 34 Comp. Gen. 239 (1954). Cf. 32 Comp. Gen 565 (1953); 38 Comp. Gen. 190 (1958).

ing damages for breach of . . . [contract]"[4] and as an alternative to the common law measure of damages—the difference between the contract price and the fair market value at the time and place of default.' The need for some flexibility in establishing the extent of the Government's damage is readily apparent in cases involving the procurement of a purely military type end item as to which there is no market value. To devise a procedure to cope with this problem and then to utilize it in all supply and service type procurements is but a logical step along the path to consistency and order in the administration of Government contracts.

Furthermore, the contractor benefits from the provision to the extent that he obtains the right to an administrative adjudication of the propriety of the assessment of excess costs. No such right exists where the Government retains money owing the contractor in the exercise of its common law right to damages for breach of contract.[6] Somewhat in derogation of the mentioned benefit is the fact that the Government can predicate a retaining of such money on its common law right to damages[i] even though the Government, because of an impropriety in effecting the repurchase, is not entitled to excess costs under the repurchase pro-

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[4] Union Metal Spinning Co., ASBCA No. **1892 (4** Jan **1955).**

[5] Eastern Tool & Mfg. Co., Inc., ASBCA No. **4815 (17** Sep 1958), **58–2** BCA **7933.**

[6] Joseph Lerner & Son, Inc., ASBCA No. **2156** (6 Sep **1955)**; Scherr Bros. Mfg. Co., Inc., ASBCA No. **2888 (31** May **1956).** These cases are distinguishable from Anchor Bronze & Aluminum Foundries, Inc., ASBCA No. **2026 (27** May **1954)** in which the board sustained the appeal from the assessment of excess costs insofar as the assessment was purportedly based on the provisions of the contract, the board having previously found no contractual right to assess excess costs. In the former cases, the assessment was based on the Government's common law right to damages.

'The right to common law damages is presumably among those "rights and remedies" preserved for the Government by sub clause (f) of ASPR 8–707 **(5** Sep **1958).** It is pursuant to this sub clause that the Comptroller General has held that damages may be assessed in the absence of a repurchase **(34** Comp. Gen. **347 (1955))**; it has also been used to sustain an assessment of excess costs thereby avoiding the question which arises under sub clause (b) of whether the repurchased item was "similar" to the terminated item **(35** Comp. Gen. **695 (1956))**, the question which is the main subject of this article. For the regulatory burden placed on an Army contracting officer to collect contractor indebtedness to the Government (including those arising from "damages *or* excess costs incident to defaults") see Secs. I & 11, AR **35–3290** (15 Apr **1955).**

vision of the contract.[8] However, the paucity of Court of Claims and Comptroller General decisions on this point indicates that contractors have felt themselves little abused by whatever use of the right of retainer the Government has made.

The exercise of the contractual right to make the repurchase and to base the assessment of excess costs thereon is not without limitation. There is in the Government, as there is in any disappointed promisee, the common law duty to minimize damages.[9] There is the further limitation that the repurchased items be "similar" to the terminated items. Five cases in the last eighteen months involving the issue of similarity show that the issue is still one of considerable difficulty to Government contractors and Government procurement personnel alike. For this reason an analysis of these and other recent cases involving the issue appears warranted.[10]

An analysis of the supply contract cases decided by the board since 1954 illustrates that the primary concern of the board in applying the similarity test is what, if any, part of the excess costs is attributable to the differences between the terminated item and the repurchased item. This concern is well illustrated by the case of *Hofmann Indus., Inc.*[11] wherein the repurchase contract called for an item substantially identical to the terminated item at a price increase of one-third. The terminated contractor argued that the repurchase contract was a sham and thus afforded no basis for the assessment of excess costs. This argument found support in evidence that within two and one-half weeks of the date on which the repurchase contract was entered into, a change order was issued calling for all plastic construction in lieu of a combination of plastic and metal and substituting new drawings with less stringent tolerances, all at no change in price. The evidence further established that the right of the Government to require just such a change had been agreed upon during the negotiation of the repurchase contract, but that this agreement had not been incorporated therein. From these facts the board concluded that the all plastic item was con-

[8] The history of such a case is unfolded in the decision of Associated Traders, Inc. v. United States, 169 F. Supp. 502 (Ct. Cl. 1959) wherein it was held that the interpretation of the word "similar" was a question of the interpretation of the contract and, hence, a question of law; the decision of the ASBCA No. 1739 (27 Apr 1954)), therefore, was not binding on the court.

[9] Bar-Ray Products, Inc., ASBCA No. 3065 (4 Nov 1957), 57–2 BCA 5209.

[10] The parallel problem in construction contracts is not within the scope of this article. See in connection therewith J. B. McKinney Co., ASBCA Nos. 3898, 4410 (3 Dec 1957), 57–2 BCA 5508.

[11] ASBCA No. 3435 (10 Sep 1957), 57–2 BCA 5016.

templated by the parties from the beginning of the negotiations and that it was this item which the contractor was pricing when he entered into the contract. The board noted testimony which suggested that the all plastic item was easier to manufacture than the terminated item and expressed concern over the fact that the Government had failed to account for the price differential between the all plastic item and the terminated item. It summed up its misgivings with the statement that there was "no evidence upon which . . . [it] might conclude that this was simply a case in which something was added by the change whose cost could be separately stated and deducted from the repurchase price."[12] Next followed the board's conclusion that the repurchased item was not similar to the terminated item.

In *Eastern Tool,'"* after terminating the appellant for default, the Government awarded the repurchase contract at a unit price of $49 (compared with appellant's contract price of $17) to one whose unit price bid on the original procurement had been $29. The appellant objected to the assessment of excess costs on the ground that the repurchased supplies were not "similar" to those called for under the original contract. The appellant showed that the original contract incorporated a "Basis of Procurement" dated 30 November 1954 which set out 21 component parts, 18 drawings and 19 specifications and standards. The repurchase contract, on the other hand, incorporated a "Basis of Procurement" dated 15 July 1955 which increased the number of parts to **23** and changed the characteristics of many of them, retained only one of the drawings and only **11** of the specifications and standards while dropping 2, changing 6 and adding 6; more specifically, items acceptable under the original contract would not have been acceptable under the repurchase contract. The board held that the burden of proof is on the Government to establish those elements of its claim for excess costs which have been placed in issue by the appeal;—one of such elements in this case was that of similarity. In holding further that the Government had failed to sustain this burden, the board stated that: ". . . the word 'similar' as used in the 'excess costs' clause, means so similar in physical characteristics, intended purpose and cost as to provide an equitable measure of excess costs."[14] The thread of the board's concern for an "equitable measure of excess costs" weaves its way through most of the cases involving

[12] *Id.* at **15, 57–2 BCA** at **5029.**

[13] Eastern Tool & Mfg. **Co., Inc., ASBCA** No. **4815 (17 Sep** 1958), **58–2 BCA 7933.**

[14] *Id.* at **7, 58–2 BCA 7940.**

similarity and it is this concern which it is felt provides the key to understanding the limits within which the board will allow the Government to operate in effecting a repurchase and in assessing excess costs.

This concern takes the form of a probing search for the relation which the differences between the terminated item and the repurchased item bear to the excess costs. Thus in the *Maximoff Research Co.*[15] case, the board brushed aside six specific differences [without disclosing their extent] between the drawings incorporated into the two contracts by noting that the Government had established that such "differences had no impact on the repurchase price,"[16] and, further, that the differences were such as could have been ordered unilaterally in the defaulted contract pursuant to the changes clause without an increase in price.

The same concern was evidenced by the board in considering the appeal of *Hoppenstand Indus Co.*,[17] in which case the repurchase contract called for steel drawers identical to those which were the subject of the original contract, but at an increased unit price. The Government granted without a price change the repurchase contractor's request for a change in the grade of steel and a substitution of three piece spot welded construction for one piece stamped and folded construction. Noting that the difference between the item called for by the original contract and that delivered pursuant to the repurchase contract did not add to the manufacturing cost or to the price paid by the Government, the board held the similarity requirement satisfied — the delivered item fairly approximated in size, quality and design and duplicated the function of the original item.[18]

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[15] ASBCA No. 5074 (17 Jul 1959), 1959 CCH Contract Appeals Decisions (59–2 BCA) par. 2283.

[16] *Id.* at 10244.

[17] ASBCA No. 1703 (30 Aug 1955).

[18] ***Accord:*** Metalcraft Eng'r Corp., ASBCA No. 1967 (22 Sep 1955) (IFB for repurchase contract described two items and asked for bid on each: one description was identical to that of terminated item, the other differed only in that the drawing incorporated therein was a revision of that incorporated in the defaulted contract. The repurchase contract was let for the latter item. The board found no evidence to establish what difference resulted from the revised drawing but noted the inference from the abstract of bids that whatever the difference, no part of the excess costs was attributable thereto.) Projects Unlimited, Inc., ASBCA No. 2563 (30 Nov 1955). *Cf.* Paramount Aluminum of Ohio Corp., ASBCA No. 4621 (19 Aug 1958), 58–2 BCA 7642 (repurchase contract called for item identical to terminated item, but delivered items contained "minor" deviations which were waived; with no mention of similarity, board held that excess costs did not arise from any departure from defaulted contract and, thus, were properly chargeable against defaulting contractor), But see Acme Chair Co., ASBCA No. 2019 (11 Apr 1955).

If a portion of the excess cost is attributable to the difference between the terminated item and the repurchased item, the board will, if furnished evidence of the amount of such portion, deduct it from the amount allowed the Government. This principle is illustrated by the case of *Schneider Silk Mills, Inc.*[19] in which the repurchase contract called for rayon cloth having 38 picks per inch, two more than the number called for in the defaulted contract. The board found this not to be a material difference, noting that it could have been ordered unilaterally pursuant to the changes clause of the original contract. However, the board reduced the excess costs sought to be charged (16.5 cents per yard) by the amount shown by the evidence to have been attributable to the additional picks (11 cents per yard).

The extreme to which the board will go in finding similarity when the Government makes a reasonable attempt to shoulder its burden of proof is illustrated by the *Dakota Process Equip. Co.*[20] case in which were involved contracts for the modification of two film processing machines. Because of certain recommendations of the repurchase contractor, the general characteristics and performance requirements contained in his contract were in certain respects radically different from those set forth in the terminated contract. The most important single difference was the substitution of a "spray system" for the "emersion system" called for in the defaulted contract. This change resulted in greater speeds, higher temperatures, smaller tanks and the elimination of hoists—at an estimated saving of $40,000 in the cost to perform. The board held that the differences shown nevertheless resulted in a similar product as to physical characteristics and use—noting in the next sentence the decrease in cost of performance due to the use of the spray system, and the fact that the other differences were not shown to have resulted in a higher price. The board next did a curious thing; expressing concern over the fact that the disparity between the repurchase contractor's price of $290,000 and his bid of $217,000 on the original procurement had not been justified in the record, it rejected the former as the basis for computing excess costs. The board then subtracted from the latter figure the $40,000 saving attributable

[19] ASBCA No. 3657 (4 Mar 1958), 58–1 BCA 6402.
[20] ASBCA No. 4435 (22 Oct 1958), 58–2 BCA 8077

to the use of the spray system and used the resulting figure as the upper limit for determining the allowable excess costs.[21]

While similarity of use or purpose has been commented on specifically by the board in several cases already discussed, only one case has been found where the board made a determination of dissimilarity of purpose. In the case of *Snap Tite, Inc.*,[22] the repurchase contract was for two items: one a practice ammunition packing box identical to the terminated item and the other a packing box for service ammunition which differed from the terminated item in that the latter was constructed of an inferior grade of lumber and had a distinctive blue band painted around it. The board disallowed the assessment of excess costs as to the service ammunition boxes on the ground that they were not similar to the terminated box; the blue band set the latter apart and limited its use. The implication of the evidence (although it fell short of convincing the board) is that after terminating the original contract for default the Government took service ammunition boxes which it had on hand and modified them for use as practice ammunition boxes. In the repurchase contract it then sought to replenish its stock of the former. The board's comment on the lack of evidence to explain certain matters concerning the modification invites conjecture as to the result of the case had the evidence been more complete. Even though the case may arguably be explained as one involving the Government's failure to sustain its burden, the problem raised by the board in finding dissimilarity of intended use on the basis of the evidence that was presented remains. In this case the board appears to have been convinced that the physical differences between the terminatd and the repurchased items were traceable to a combination of a reduced need for the former and a substitution of the latter for the purpose of fulfilling a need independent of and unreleated to that which resulted in the original procurement action. In all the other similarity cases discussed the differences between the two items were traceable to a specific request of the repurchase contractor, a technological advancement resulting in a better product or the repurchase of the best available substitute for the terminated item. It is thus arguable

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[21] *Cf.* Federal Eng'r Co., ASBCA No. 2726 (12 Dec 1955) in which the board computed excess costs from the repurchase contract price after finding similarity where the repurchase contract specifications contained relaxed electric current emission tolerances, the board noting that this contract was probably less expensive to perform since there would be fewer rejections.

[22] ASBCA Nos. 1339, 1808 (26 Apr 1954).

that the board in *Snap Tite* rested on the similarity requirement of sub clause (b) of the default clause the proposition that payment of additional costs arising from the purchase of a not identical item which was intended to fulfill a new need was not an obligation of the contractor under that provision. Or, stated otherwise, the Government may not under the guise of an assessment of excess costs obtain money from a defaulted contractor to be applied toward payment for a purchase which in the normal course of events would have been the subject of a separate and distinct procurement action. Such a limitation on the Government's rights under sub clause (b) of the default clause is consistent with the theory that in a default situation the Government should not as a matter of course seek the full measure of its common law damages for breach of contract, but should limit itself to that measure of relief which will protect it from pecuniary loss.

The question at what point in the life of th repurchase contract the similarity test must be met has not been the subject of a holding by the board. In *Hoppenstand* the board ignored the Government's argument that the test should be applied to the item originally specified in the repurchase contract, and proceded to find the test met by the item actually delivered. In *Hofmann* the board, faced with the same argument by the Government, again applied the test to the delivered item, in this case finding an absence of similarity. In *Federal Eng'r*,[23] the board applied the test to the electronic tubes initially specified in the repurchase contract. It noted that evidence of changes in the tubes ordered subsequent to the lettering of the repurchase contract failed to show the extent of such changes and concluded that under the circumstances no prejudice to the defaulted contractor could be found. These cases suggest that the board will let itself be guided more by the evidence and arguments which the appellant seeks to introduce or advance than it will by any fixed rule. Thus it would seem that the Government must be prepared ultimately to show the cost relation between the subject matter delivered by the repurchase contractor and the subject matter of the terminated contract.

[23] Federal Eng'r Co., **ASBCA** No. **2726 (12 Dec 1955).**

In summation it may be observed that where physical differences[24] between the terminated and the repurchased items are shown, the search of the Armed Services Board of Contract Appeals centers on the issue of what, if any, effect such differences had on the excess costs. This search involves the burden of proof issue which was the holding in the *Eastern Tool* case. Proof of physical similarity — in the sense that the differences between the terminated and the repurchased items were such as might have been ordered pursuant to the changes clause of the terminated contract — and proof of similarity of intended use will not suffice. I fthe differences between the two items remain unexplained in terms of effect on the excess costs sought to be assessed, the board will find either a lack of similarity as in *Hofmann,* or a failure of the Government to have sustained its burden on the issue of similarity as in *Eastern Tool.* On the other hand, if it be established that the differences between the two items had no effect on the repurchase price or that the repurchased item was less costly to manufacture, or if the amount of the increase in the repurchase price attributable to the differences be shown, then it will be found by the board that there exists an equitable basis on which to assess excess costs and, thus, that the similarity requirement of ASPR 8–707(b) has been met by the Government.

MAJOR JOSEPH C. VAN CLEVE, JR.*

[24] Not involving any physical difference is the case of Stanley W. Taylor, ASBCA No. **3641 (24** Jan 1957), **57–1** BCA **3145.** There the board held that the repurchase of new asphalt under specifications identical to those in the terminated contract, but pursuant to which the contractor had indicated an intent to furnish Government surplus asphalt, constituted the purchase of a similar item; curiously, the board relied for authority on **35** Comp. Gen. **695 (1956)** which held under similar circumstances that the withholding of excess costs was proper under sub clause (f) of the default clause. Also see the cases cited in footnote 8, *supra.*

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BOOK REVIEWS

***The Modern** Law **of** Land Warfare.* By Morris Greenspan. University of California Press, **1959.** Pp. **627.** Appendices. Index.

Very rarely, there appears on the legal scene a book which because of its breadth of scope and penetrating analysis of subject deserves to be described as monumental. This is not such **a** book. Nevertheless, it is in large measure, what the author in his preface promised it would be, an accurate, comprehensive and systematic statement of the law of war on land as it exists today. The attainment of this objective is no mean accomplishment and Mr. Greenspan is to be congratulated for having written an extremely useful and informative book.

An outstanding Roman Law scholar, Dr. Fritz Schutz, once told this reviewer that the best way to read a law book was to first read the footnotes. If the author had padded the book with repetitious footnote references or had neglected to mention essential source materials, it would be unnecessary to read the text. If the footnotes indicated thorough research and made reference to outstanding authorities, the reader could tell at a glance that what the author had to say would be meaningful.

This reviewer employed this technique in reading this book and was overwhelmed by a plethora of footnote references. The author's research has been exhaustive; there are few sources he has missed and he has organized his material well.

The book is divided into nine parts, each of which has at least one chapter. In Part I (Introduction), the author pleads for a new codification of the law **of** war. In a sense, the remainder of the book is a demonstration of the justification of this plea. This approach spares the reader a detailed historical review of the development of the law but leaves him wondering why the author did not make at least passing reference to the Lieber Code when discussing the development and sources of the law of war. The analysis of the political nature of war could have been improved by consideration of, or at least citation of, Quincy Wright's ***A** Study* of *War*.

Part II (The Commencement of War and its Participants) and Part III (The Victims of War) are the least stimulating portions of the book. At the same time, they are the most meaty and the most useful for the reader who wants a ready interpretation of the conventional law. The author has minutely analyzed the Hague Regulations and the **1949** Geneva Conventions and but-

tressed his exposition with copious reference to *travaux preparatoires* commentaries and judicial decisions. The principle defect of this section is its slavery to the language of the convention being construed. Page after page of the text material consists of nothing more than quotations from or paraphrases of the language of the treaty under discussion. One gets the impression that the body of the text and the footnotes have been transposed. It would have been better, had the author or the editors devised a method of indenting or changing the size of the type to enable the reader more readily to determine which words are those of the author and which are those of the treaty being construed. In fairness to the author, however, it is difficult to explain a large complex treaty, such as the 1949 Geneva Civilian Convention without performing the mechanical function of article by article analysis, and the reader should be grateful for Mr. Greenspan's having done this yeoman service.

Part IV (Enemy Territory and Property) deals with a branch of the law which was neglected between the world wars. Fortunately, interest in occupation law has intensified since World War II and it is not likely, so long as present world tensions continue, that source materials on this subject will lie buried in obscure corners of law libraries or in government files, the lot that befell the World War I Hunt Report. The author has a thorough grasp of the law and the British and United States practice in the field of belligerent occupation in recent years. Unfortunately, United States civil affairs doctrine has experienced a reappraisal since the Korean War. Agreements governing civil affairs doctrine, training and policy have been concluded between the United States, the United Kingdom and Canada (SOLOG Agreements) and by the NATO countries (STANAG Agreements). FM 27–5, *United States Army and Navy Manual of Civil Affairs Military Government* (1947) has been replaced by FM 41–5, *Joint Manual of Civil Affairs/Military Government* (1958). Further changes in doctrinal concepts occurred in 1959, when the term "military government" was deleted from Army terminology. The author may be excused from failing to take account of these strictly military developments in his treatise. How they will effect the law remains to be seen. Mr. Greenspan's exposition is not rendered valueless by these changes, but, the reader seeking an up-to-date picture of U.S. civil affairs doctrine should exercise caution in reading these portions of the book. For example, the author's confidence in the passage from paragraph 32c, FM 27–5, relating to the procedure of courts created

by the occupant, which is quoted at page 259 would appear to be misplaced. That passage was rendered suspect by the promulgation of the 1951 edition of the Manual for Courts Martial, United States (see par. 2, MCM 1951) and the entire question of the organization and procedure of civil affairs tribunals is presently being re-evaluated. This subject appears in the book in an addendum in which are also discussed a number of related topics, including and perhaps somewhat out of context, status of forces agreements. The author's treatment of property in occupied areas is lucid and persuasive. He does not, however, delineate the technical distinctions between "seizure" and "requisition" nor does he favor the reader with an explanation of how civil law conceptions of property law came into international law. One might expect to find information of this sort in a book of this scope.

Parts V (Hostile and Nonhostile Relations) and Part VI (The Enforcement of the Laws of War) are perhaps the most interesting parts of the book. The author recognizes controversial questions and takes a stand without laboring obscure issues. One might regard his condemnation of such modern weapons as gas, flame throwers and the H-bomb as justified, were it not for the fact that their aleged illegality is ultimately bottomed on world public opinion and ont on provisions of universally binding conventions. World public opinion is too elusive and subjective a standard with which to prejudge possible employment of these weapons. It is clear, however, that what is needed here is *a* multilateral convention listing new categories of forbidden weapons.

The author's treatment of war crimes is excellent. The perplexing problem of the legality of punishing crimes against peace and the act of conspiring to wage aggressive war which prior to World War II had received scant documentation in conventional international law and, which certainly would not satisfy municipal law interpretations of the maxim, *nullum crimen sine lege, nulla poena sine lege,* is fairly stated and persuasively argued. The same may be said for the much publicized defense of superior orders.

The remainder of the book consists of Part VII (Neutrality), Part VIII (Termination of War), and Part IX (Armed Conflict Not of an International Character). All of these topics receive more than adequate exposition. The author carefully relates the traditional concepts of neutrality to the provisions of the 1949

Geneva Conventions and the United Nations Charter. As elsewhere in the book, there are copious footnote references. The author avoids an opportunity to discuss in detail the peculiar status of post World War II Germany in connection with his discussion of peace troubles. The subject is earlier mentioned (note 25, p. 216). In his final chapter, the author treats somewhat apologetically in a book on international law, of wars that are not of an international character. This addendum is both legitimate and enlightening. The 1949 Geneva Conventions dealt with this problem and civil and colonial wars have further unsettled the present shaky posture of world peace.

Some mention should be made of the appendices, bibliography and indices to the book. The appendices contain selected regulations annexed to certain of the 1949 Geneva Conventions, and the text of the 1923 Hague Rules of Air Warfare. The latter may still be meaningful as a restatement of the then prevailing customary law. The list of cases and treaties occupies twelve pages: a bibliography conveniently classified into government documents listed by countries, books of private authorship, articles and periodicals, and serial publications fills eleven more pages. The index is likewise extremely detailed. The author furnishes a list of abbreviations at the outset of the book which complements these indices and provides a key to his system of citation.

To return to the original frame of reference for this review, Mr. Greenspan has written an extremely useful book. One would have preferred to have seen some discussion of condominium. This reviewer searched through the index and reread several passages relating to occupation and termination of hostilities where it might be relevant, but found no mention of the term. As a military lawyer, this reviewer regrets the failure of the author to mention any of the texts prepared during World War II at the Judge Advocate General's School, Ann Arbor, Michigan, viz. The Law of Land Warfare (JAGS Text No. 7 (1943)) and The Law of Belligerent Occupation (JAGS Text No. 11 (1944)). These may now be regarded as classics despite their obvious shortcomings as expositions of the current law. An examination of them would have aided in expliaining the position of the United States relative to the conduct of warfare and belligerent occupation in World War 11. At the risk of showing some preference for the 1940 edition of FM 27-10 (U.S. Rules) the author has cited that manual before a companion citation of the 1956 version of the same manual (U.S. Law). In so doing, he has

provided a handy cross reference to the former and current guides to U.S. practice.

The value of the book will vary of course with the needs of the reader. The reader who wants a quick survey of the field might find 615 pages of text too formidable; one who needs occasionally to consult an authoritative reference will find that this book more than satisfies his wants. The reader who works daily in the field will be hard put to find a more serviceable exposition of the law. It is a fitting ocmpanion to FM 27–10, the bible of the Military lawyer working in this field, and a "must" in every military law library. It more than meets Professor Schultz's test and provides a bonus in the form of an ample discussion of the law and a veritable gold mine of footnote references.

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Nuclear Weapons and International Law. By Nagendra Singh. Published under the auspices of the Indian Council of World Affairs, New Delhi. New York: Frederick A. Praeger, 1959. Pp. 255. Index.

The laws of war have been stated for the ground forces in an official publication, *The Law of Land Warfare.*[1] For those who have had occasion to study the manual's contents it may seem that certain of its provisions fall short of representing unequivocal enunciations of rules of positive law.[2] One such provision would appear to be that dealing with the legality of the use of nuclear weapons. It provides that the use of "'atomic weapons' * * * cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment."' To state it this way is to leave the lawyer with the question whether there is (or are) at present any customary rule(s) of international law or any international convention restricting the employment of nuclear weapons.[4] This reviewer found Dr. Singh's[5] consideration of this truly provocative question of law to he generally interesting and informative.

Specifically, the author has focused on the thermonuclear multimegaton bomb and appraised its legality as a weapon of war under both customary and conventional international law (p. xi). His process of appraisal subjects the American position to an

[1] Department of the Army Field Manual 27–10, July 1956. For the manual's application to the other services when engaged in land warfare, see Departments of the Army, the Navy, and the Air Forcr. Joint Manual of Civil Affairs/Military Government, Nov. 1, 1958, par. 1h.

'See, in this connection, Professor Baldwin's call for a further explication of the laws of war in *A New Look at the Law of War: Limited War and Field Manual 27–10,* 4 Mil. L. Rev. 1, 38 (DA Pam. No. 27–100–4, Apr. 1959). For a consideration of factors which serve to discourage the formulation of specific rules of war law — as opposed to general principles and vague standards — see McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War,* 67 Yale L. J. 771, 809–811 (1958); The Judge Advocate General's School. Law of Belligerent Occupation, 1, 2 (1959).

[2] Law of Land Warfare, *op. cit. supra* note 1, par. 35.

[4] For a positive statement that the use of nuclear weapons against enemy combatants and military objectives is permitted, see Law of Naval Warfare, Nav. War. Info. Pub. 10–2, Sep. 1955, Art. 613. The Navy manual is also reprinted as an appendix to Tucker, The Law of War and Neutrality at Sea, International Law Studies, Naval War College, 1955 (G.P.O. 1957).

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exacting analysis and rhetorical test.[6] This of course is a feature of the book that is of particular interest to the military lawyer.[7]

The author's work is divided into four parts. The first part is his introduction. In it he concerns himself with both philosophy and fact as he seeks to influence the reader to accept his subject as important, timely and useful. Theoretically, he probes for the origin and the sanctions of the laws of war. He finds the former in principles of chivalry, humanity,[8] and in the tenets of the great religions of the world—not only those of Judao-Christian society but also the Moslem, the Hindu and the Buddhist as well (p. 18). From these roots, his thesis goes, there grew a customary law of war (as expressed in military manuals) and great multilateral conventions (pp. 19, 20). He finds the sanctions of the law of war in the mutual advantage of nation states in observing certain rules of war[9]—with a strong assist from the threat of reprisals (p. 5). Interestingly, he cites the abstention from gas warfare during the second World War to prove his point that fear of massive retaliation, rather than respect for law, is the true reason why national decision-makers choose to limit means of violence in war.[10] Fear of massive retaliation may well have been the reason why the Germans did not use gas, but it is not believed by this reviewer that it was *the* reason why the United States did not use gas, especially after superiority in the air had been attained. Others have intimated, if not said, that the true reason was that poisonous gas would have been militarily inefficient on the World War II battlefield.[11] Perhaps so, but for Americans it would seem

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[6] Both the Army manual, *op. cit. supra* note 1, and the Navy manual, *op. cit. supra* note 4, are taken to represent the American position with respect to wartime uses. The author cites them frequently.

[7] Dr. Singh is not the first, and probably not the last, to dissertate upon selected contents of our law of war manuals. See, *e.g.*, Schwarzenberger, *The Legality of Nuclear Weapons* 4 (1958) ("What is considered as settled in the two United States manuals constitutes our problem").

[8] For a realistic appraisal of the meaning of these principles in an unlimited war of the future, see McDougal & Feliciano, *supra* note 2, at 795, 796, 803. See also Baldwin, *supra* note 2, at 17.

[9] This platitude is broken down into specificities by McDougal & Feliciano, *supra* note 2, at 812–814, and by The Judge Advocate General's School, Associate Advanced Officer Course, Civil Affairs, International Conflicts, at 273–282 (1956). As suggested earlier, note 2 *supra*, there are few "rules" of war—to use that term precisely. See Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482–486 (1933).

[10] Professor Baldwin, *supra* note 2, at 5, makes the same point with the same citation.

[11] See McDougal & Feliciano, *supra* note 2, at 805, 806, 830, 831. Baldwin, *supra* note 2, at 5 recognizes it as an additional reason.

that ingredients other than military efficiency enter into decisions of this type.[11a] Here, to the consternation of some, it is not easy to erect a barrier between law and morals.

Turning from theory to facts, the author records the effects upon human beings of the radioactive fall-out from nuclear weapons (Chap. 2). His data is based on medical reports prepared after the Hiroshima and Nagasaki bombings and the 1954 Bikini tests. His purpose, and here his approach to the study is revealed, is to provide the facts that may later serve as a basis for considering nuclear effects in light of "the ban on the use of poison under customary international law" (p. 21).

Part Two is entitled "Nuclear Weapons and Customary International Law." He begins by distinguishing between usage and custom (pp. 45-48), and accounting for the effect a conversion into multilateral convention has upon customary rules (pp. 48-54). The now outmoded "general participation clause" of World War II concern is singled out for special consideration (pp. 55-58). Continuing with academic premises the author records the sources of international law (pp. 58-75). In his view they include judicial decisions and the teachings of qualified publicists as well as international agreements, custom and the controversial "general principles." Here it is noteworthy that he singles out our military manuals on the law of war as particularly important sources. Three times he states that they must be regarded as binding! (pp. 68, 69, 74). His advocacy overlooks at least two troublesome points. One is that both our manuals state that they are not "binding upon courts and tribunals applying the law of war."[12] Secondly, upon whom are they binding? Our allies? International units? The enemy?[13] If, as the author states (p. 77), the Army manual is in strict conformity with the Hague Regulations, it would seem that he might be willing to supply an affirmative answer to these questions. It is submitted that to go that far is to be unrealistic. It would seem preferable to regard our manuals as ***evidences*** of war law — persuasive evidence of course when the conduct of *our* forces is to be judged.

[11a] It would appear that this is President Eisenhower's view as well. See his news conference of 13 January 1960 reported in The Washington Post, 14 Jan. 1960, p. A14, col. 1.

[12] Law of Land Warfare, *op. cit. supra* note 1, par. 1; Law of Naval Warware, ***op. cit.*** *supra* note 4, Art 110 (wherein the word "rules" is substituted for the word "law" in the quotation).

[13] It is not uncommon to speak of the manuals' provisions as amounting to a military order. See, *e.g.*, Fratcher, ***The*** *New Law of Land Warfare*, 22 Mo. L. **Rev. 143, 144 (1968).**

The author's concern with what Professors McDougal and Feliciano would characterize as "normative-ambiguous definitions and formulations"[14] leads him to a treatment of such "doctrines" as military necessity, military success and military danger (pp. 75–90). He reaches one conclusion with which we are not likely to disagree — that none of these "doctrines" justify the use of illegal weapons in war. Yet Dr. Singh would go beyond merely ruling out a resort to illegal weapons in this context. In the case of military units confronted with the dilemma of capture or destruction, for example, his position is that they may not resort to any unlawful act to escape destruction,'' because by surrendering the troops have a means of escaping from destruction" (p. 86). If this be law and a proper rationalization, it ought to challenge the American military lawyer faced with the task of interpreting and, potentially, applying our Code of Conduct.[15]

Returning to principles of humanity and chivalry and their relevance to the question of legality of the use of nuclear weapons in war, the author recognizes, as others have and we must, that their meaning today is one of degree (pp. 90–105). The principle of humanity dictates that there be a distinction between combatants and non-combatants. But this is a distinction meaningful only in the context of a realistic identification of the persons properly includable in the two categories, and of a realistic assessment of the violence to which non-combatants may incidentally be subjected. True, the principle of chivalry has imbued us with a vitriolic distaste for excesses and treachery. But in an unlimited war these principles may contribute no more than a futile protestation against the terrorization of the civilian populace as such.[16] The author correctly points out a paradoxical feature of the rules of conventional law (The Geneva Civilians Convention). The rules extend to civilians within occupied territory a greater quantum of legal rights than are extended to civilians found outside occupied territory (pp. 95, 96).

The concluding chapter in Part Two is devoted to a consideration of the so-called rights of military survival, self-preservation, and individual and collective self-defense as they relate to the use of nuclear weapons. For the most part it is a reprint of an article

[14] McDougal & Feliciano, *supra* note 2, at 774, 775.

[15] Promulgated by Exec. Order No. 10631, 20 Fed. Reg. 6057 (1955).

[16] Dr. Singh agrees with Dr. Schwarzenberger, *op. cit, supra* note 7, at 45, that terrorization marks an impermissible extreme. McDougal & Feleciano, *supra* note 2, at 803, query whether the extreme is the preservation of the earth as a habitable abode for man!

written by Dr. Singh in 1956 for the Indian Year Book of International Affairs. Professors McDougal and Feliciano have had occasion to review, as it were, the author's point of view.[17] Although it is disappointing that Dr. Singh makes no reply to his critics, it is only fair to recognize that his book was probably submitted for publication before he had an opportunity to see McDougal and Feliciano's recent work.

Part Three is a compartmentalized consideration of the treaty laws relevant to his study. The compartments are four:[18] three that are alike topic-wise, land warfare, naval warfare and air warfare, and one that stands alone, the Geneva Conventions of 1949. The author takes the position that use of nuclear weapons in the megaton range would (1) violate the conventional rules of land warfare on several counts;[19] (2) make compliance with the London Protocol of 1936[20] and Hague Convention IX[21] nigh impossible (pp. 174–181); (3) violate no meaningful conventional rule of air warfare simply because no such rule exists (p. 182);[22] and (4) render nugatory the "protected person" status created by the Geneva Conventions of 1949 (pp. 197, 201).

In Part Four he concludes that the first nation or force to use nuclear weapons in war has violated international law. He admits to no exceptional situations justifying a first resort (p. 215).[23] He recognizes only the validity of a resort to nuclear weapons as a

[17] See McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 Yale L. J. 1057, 1153 (1959).

[18] Actually five. A brief discussion of the conventional rules requiring a declaration of war prior to the commencement of hostilities introduces Part Three.

[19] Its effects would exceed the limits of permissible means of injuring the enemy under Article 22 of the Hague Regulations (p. 148); it would cause '(unnecessary suffering" contrary to article 23(e) of the Hague Regulations (p. 150); it would release "poison" and thus is a poisonous weapon banned by article 23(a) of the Hague Regulations (p. 164); and because it is designed to be a surprise weapon of attack its use would be treacherous and violative of Article 23(b) of the Hague Regulations (p. 169).

[20] Forbidding unrestricted sinkings by submarines. The United States is a party to the Protocol. For commentary on the present status of the Protocol, see Tucker, *op. cit, supra* note 4, at 63-70.

[21] Dealing with naval bombardment.

"The author does not dismiss the question as to the legality of aerial delivery of nuclear weapons so laconically. He pursues an answer in the rather evasive customary rules of aerial warfare. His conclusion is that those rules prohibit aerial delivery to terrorize the civilian populace (p. 193).

[23] Thus our country's bombing of Nagasaki and Hiroshima is viewed critically (pp. 195, 196).

form of reprisal, and then provided the principle of proportionality is satisfied (p. 217) and no undue harm is done to persons protected from reprisals by the Geneva Conventions of 1949 (pp. 220–222).

In a final chapter, labeled retrospective but perspective as well, the author joins the McDougal and Schlei versus Margolis debate[24] on the legality of our hydrogen bomb tests in the Pacific, siding with Margolis (pp. 227–235); and considers the particular threat a wartime use of nuclear weapons poses to neutrals, such as his own country. He defends eloquently his thesis that the principle of humanity demands a "blanket prohibition" of the use of nuclear weapons (pp. 243–245).

It is not unkind to characterize this book as a primer on war law with emphasis on nuclear weapons. Dr. Singh's work is scholarly and sincere, and, especially valuable in that it makes known to us the point of view of a representative of one of the great "uncommitted" states.[25] It is also interesting to note the extent that the natural law has influenced his thinking. On the merits, however, the book is not likely to displace Schwarzenberger's study[26] nor match McDougal and Feliciano's perspectives.[27]

DWAN V. KERIG*

[24] McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective,* 64 Yale L. J. 648 (1955); Margolis, *The Hydrogen Bomb Tests in International Law,* 64 Yale L. J. 629 (1955).

[25] See McDougal & Feliciano, *supra* note 2, at 787; Butterfield, Christianity, Diplomacy and War. 90, 01 (195-).

[26] Note 6 *supra.*

[27] Notes 2 and 17, *supra.*

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DIGEST — Annotated and Digested *Opinions*, United States Court *of Military* Appeals. By Richard L. Tedrow. Harrisburg: The Stackpole Company, 1959, pp. **546.**

Richard L. Tedrow, Chief Commissioner, United States Court of Military Appeals, states that a preface generally permits an author "to tell a lot of lies about how good he is" and many "an author well needs such an opportunity in order to forestall complete unanimity of contra opinion." It is hoped that this review will allay Mr. Tedrow's concern. He has prepared an excellent work, although its contents to some extent belie its title. As the author notes in his preface, it is ". . . closer to a text with the footnotes moved up . . ." than the sort of digest to which attorneys have grown accustomed. Be that as it may, the volume is a concise, though comprehensive, exposition of military criminal law as interpreted by the United States Court of Military Appeals. The need for ready access to the ever expanding reported decisions of the Court led its author to prepare the original draft of the Digest for the use of the Judges and Commissioners. Early recognition of its value led to its mimeographed reproduction and distribution throughout the Army and Air Force. The inconvenience occasioned by the size and binding of the earlier manuscript caused its replacement by the new, pocket-sized edition. Its organization, the method of presentation and the insight afforded into the attitudes of the various judges make it an invaluable research tool for the military practitioner.

The Digest is alphabetically arranged under 99 main headings. Subtitles are provided in like manner under each heading. Thus, a researcher desiring to locate the Court's opinions regarding the duty of a military accused to submit to taking of a blood test need only refer to the heading "Self-Incrimination." He will find the pertinent materials collected under the subtitle "Blood Samples." Decisions reached by the Court following the compilation of the original draft are found in a supplement included near the end of the work.

Cases included in the work are not limited to those decided by the Court of Military Appeals. Many pertinent decisions of the Supreme Court and the various United States Circuit Courts of Appeals are digested. These are compared to military decisions, and the ensuing discussion often gives an excellently reasoned prediction of the Court's probable holding in a particular area. In other areas, where there is doubt concerning the status of the present law, the author does not hestitate to express an opinion

as to what he deems the law is. For example, he states that ". . . as a parctical matter the MCM rule (p. **251)** that confession must be corroborated by evidence showing crime probably committed by someone is present law. . ." This conclusion is derived from a plethora of conflicting and confusing decisions of the Court of Military Appeals. Nevertheless, in this area, as in all others, the holdings and rationale of the various opinions are fully and clearly set forth.

Staff Judge Advocates will find his expressions of opinion concerning the probable development of the law of peculiar value. Many errors which appear on appeal could have been cured by careful pretrial development of the case, without harm to the interests of either the Government or the accused. The *Digest* offers a key to the thinking of the Court in many uncharted seas. By application of the thoughts offered in the preparation of **a** general court-martial, thoughtful judge advocates will be able to eliminate many grounds for later claims of prejudicial error. It is frequently too late to do so when Government counsel is appearing before the Court.

Mr. Tedrow's scholarship and thoughtful attention to detail leave little to criticize in his excellent work. The major faults noted by this reviewer involved the excessive use of abbreviations throughout and the lack of references keyed to the *Court-Martial Reports.* To the lawyer not on active duty many of the abbreviations used mean very little without constant and bothersome reference to the Table of Abbreviations. Cognizance should also have been taken of the fact that the *Court-Martial Reports* rather than the *United States Court of Military Appeals Reports,* is the reporter system most generally used in the armed services. Case citations should, therefore, have included references to both systems. The cross referenced "Case Index" does not wholly solve the problem.

Withal, these are minor points and do not detract from the basic excellence of Comissioner Tedrow's digest. He is to be complimented on the high editorial standard and general attractiveness of this useful and long needed book. It is certainly to be hoped that he will prepare annual supplements in order that its value to legal officers may be maintained and enhanced.

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WORD INDEX

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